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Common Cultural Property: The Search for Rights of Protective Intervention

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Common Cultural Property: The Search for Rights of Protective Intervention

*M. Catherine Vernon**

I should assuredly be prepared to be shot against a wall if I were certain that by such a sacrifice I could preserve the Giotto frescoes; nor should I hesitate for an instant . . . to save Saint Mark's even if I were aware that by doing so I should bring death to my sons. I should know that in a hundred years from now it would matter not at all if I or my children had survived; whereas it would matter seriously and permanently if the Piazza at Venice had been reduced to dust and ashes The irreplaceable is more important than the replaceable, and the loss of even the most valued human life is ultimately less disastrous than the loss of something which in no circumstances can ever be created again.

Sir Harold Nicolson, 1886-1968, British author and statesman.¹

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¹ *Marginal Comments*, SPECTATOR, Feb. 25, 1944, quoted in 2 JOHN H. MERRYMAN & ALBERT E. ELSSEN, LAW, ETHICS, AND THE VISUAL ARTS 37 (1987).

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I. INTRODUCTION

The protection of irreplaceable cultural heritage can be very difficult under modern international legal traditions. Yet global concern for cultural property takes on increasing significance since, unlike most natural resources, archeological resources are not renewable.² The concept of "common cultural property,"³ raises many legal issues in both private and public international law. This Note will develop arguments and discuss legal issues associated with the concept of protective intervention, by other states or international organizations, in a national government's sovereign jurisdiction over nonmoveable, culturally significant sites located within its political boundaries. Can a right of preservation that includes a right of intervention find support in the body of international law addressing cultural property? If so, how far can that right go and what type of intervention is supportable?

As evidence of the world's increasing recognition of the importance of cultural property, numerous agreements, treaties, and conventions in international law have been developed⁴ to encourage the protection, preservation, and display of the world's common cultural heritage — that is, cultural property which is of such significance that the entire world has an interest in its protection and preservation.⁵ But, to whom does this common cultural property belong? Exactly who should control its preservation? Difficulties arise under existing principles of international law as to whether the concept of common cultural property, although recognized in principle by various treaties and legal scholars, can

² Clemency Coggins, *Archeology and the Art Market*, 175 SCI. 263, 263 (1972).

³ This term is used to refer to art, architecture, and archaeological sites deemed to be of significance to the entire world, a multi-state group, or even culturally homogeneous groups not identified with any currently recognized state — *i.e.* the American Indians, Palestinians, etc.

⁴ See *infra* parts V, VI for discussion of the historical development of these agreements.

⁵ See John H. Merryman, *International Art Law: From Cultural Nationalism to a Common Cultural Heritage*, 15 N.Y.U. J. INT'L L. & POL. 757, 759 (1983) [hereinafter Merryman, *International Art Law*].

be applied in the reality of international relations and transnational legal norms. Much of this difficulty stems from the focus of longstanding traditional legal norms on territorial sovereignty, and a nationalistic emphasis of cultural property treaties which grant control of common cultural property to the situs state, regardless of any other interested parties or states.

In view of actual state practice where existing common cultural property is not recognized as such or is not adequately protected, examples of which will be later described in this Note, one could conclude that the concept of common cultural property is a mere legal fiction. That is, when existing international law is based on principles of nation-state patrimony and the right of territorial sovereignty, this concept of common cultural property continually bows to national legislation and treaties upholding national responsibility for the care of cultural property.⁶ As will be shown, this regime sometimes operates to the detriment of identification and preservation efforts, which lends support to the argument that a more effective legal framework involving internationally sanctioned, outside intervention is warranted. Since the currently recognized nationalistic approach to the governance and protection of the world's cultural property can be a handicap to necessary protection efforts, it should be replaced with a more global and protective regime that sanctions intervention under limited and controlled circumstances by an appropriate international body.

The past two hundred years of colonialism have done much damage to the cultural holdings of many lesser developed countries who have reacted by tightening national controls over antiquities, often with adverse effects upon archaeological efforts.⁷ Foreign archaeologists frequently have found it difficult to obtain permission to explore and excavate archaeological sites due to restrictive national policies. This often has been compounded by the effects of strained international relations between the host government and the government of the archaeologists' state.⁸ Since cultural property can be of cultural significance to more than one state, the concept of common cultural property is meaningless when international laws and treaties do not prevent destruction by a host state, or allow entry by foreign groups or states for enforcement of common interests in that property. Such intervention should be provided

⁶ See, e.g., Halina Nieciówna, *Sovereign Rights to Cultural Property*, 4 POLISH Y.B. INT'L L. 239, 246 (1971) (stating that "[i]n practice . . . the concern to preserve cultural heritage and protect it against threats to diminish it, remains today almost exclusively within the sphere of municipal law[.]").

⁷ H. CRANE MILLER, INTERNATIONAL LAW AND MARINE ARCHAEOLOGY 32 (1973).

⁸ *Id.*

for under international law.

Many articles and books have addressed the illicit transfer of art and artifacts, and their return under a right of recovery in international law.⁹ The treaties of protection and the awareness of the international community that has developed during the past twenty years over problems of stolen cultural objects and illicit trade in art and artifacts,¹⁰ particularly where developing countries are being harmed and exploited, continues to be an area where protective international laws and policies are warranted.¹¹ The law concerning the preservation of archeological and architectural sites within their country of origin, however, generally has not been discussed.¹² Through a discussion of the status of nonmoveable, cultural property preservation — *i.e.* buildings, excavation sites, etc. — and specific examples of the failure of existing international law to provide effective protection, this Note will suggest the need for a new international norm: a truly international approach to the protection of common cultural property that includes a right of intervention in the territorial sovereignty of individual states under limited and controlled circumstances. It is a discussion of the continuing dilemma posed, on the one hand, by the traditional notion of property rights handed down by the Romans, and on the other hand, by the requirements of public and international interests which make it desirable that archaeological sub-soil and structures, no matter which country has a territorial claim to it, be completely included in the international public domain for preservation rights.¹³

Part II of this Note discusses specific situations where common cultural property is being destroyed, illustrating the problems that arise

⁹ See generally FRANK G. HOUEK, PROTECTION OF CULTURAL PROPERTY AND ARCHAEOLOGICAL RESOURCES: A COMPREHENSIVE BIBLIOGRAPHY OF LAW-RELATED MATERIALS (1988) (providing an exhaustive bibliography of resources on cultural property, many of which address the illicit transfer of artifacts and art).

¹⁰ See generally JEANETTE GREENFIELD, THE RETURN OF CULTURAL TREASURES (1989).

¹¹ See, e.g., Leslie S. Potter & Bruce Zagaris, *Toward a Common U.S.-Mexican Cultural Heritage: The Need for a Regional Americas Initiative in the Recovery and Return of Stolen Cultural Property*, 5 TRANSNAT'L LAW. 627, 634-36 (1992) (discussing illicit trafficking in the cultural property of Mexico); Mark A. Gutchen, *The Maya Crisis and the Law: Current United States Legal Practice and the International Law of the Maya Antiquities Trade*, 1 ARIZ. J. INT'L & COMP. L. 283, 286 (1982) (describing the "spectacularly organized" illicit traffic in Mayan artifacts and its devastating effects).

¹² See, e.g., HOUEK, *supra* note 9 (Houdek's bibliography on protection of cultural property contains 34 pages of periodical articles on moveable cultural property, but only four pages of articles on nonmoveable cultural property.).

¹³ 1 LYNDEL V. PROTT & P.J. O'KEEFE, LAW AND THE CULTURAL HERITAGE: DISCOVERY AND EXCAVATION 188-89 (1984).

despite existing cultural property law; this section is, therefore, supportive of the need to recognize an international right of intervention. The tensions that exist between claims of territorial sovereignty and rights of intervention for purposes of cultural protection are the subject of part III. Part IV covers arguments favoring the doctrine of national patrimony which upholds the notion of complete control by the situs nation based on historical ties, versus a new doctrine of protective intervention under common rights to significant property. A discussion of the historical development of the law governing cultural property, and its origins in the law of war, is provided in part V. This discussion on the law of cultural property continues in part VI, which provides a survey of the definition of common cultural property under existing international law, and describes how most current treaties are ineffective because of their emphasis on rights of host states. It will also show, however, examples in the development of cultural property law that are sometimes contrary to traditional property law concepts and which are useful in developing arguments for protective intervention. Part VII discusses the concept of common cultural heritage in the context of the Law of the Sea Convention, and its usefulness in arguments favoring a multijurisdictional approach to control of common heritage found on land. Part VIII concludes, and in the process suggests how common cultural property laws for immovable property and archeological sites can, and should, provide a meaningful and effective international framework for the treatment of property deemed to be part of the world's common cultural heritage.

Without developing the specific details of the proper methods of defining or administering protective cultural intervention, which could involve years of writing by scores of international representatives and legal scholars, this Note argues only for *the recognition* of rights of intervention. Once accepted as a norm whose time is due, international effort and cooperation can ultimately develop a framework for the use of diplomatic and non-military intervention by an apolitical, international body that has clearly delineated which properties are to be considered common culture, and what protective action is necessary. The concept is based on rights of protective entry, not removal.¹⁴ The ultimate goal is

¹⁴ The term "protective entry" means steps taken to prevent destruction of immoveable cultural property, whether that destruction is from the omission of acts to prevent natural aging and erosion, or from overt acts of looting, war, or improper excavation. Protective intervention, for example, would sanction internationally coordinated efforts to stop deterioration of the Sphinx, which, "according to . . . [the] chairman of the Egyptian Antiquities Organization, has deteriorated more in the past 50 years than in all the previous centuries of its existence." *Saving the Sphinx*, *ARCHAEOLOGY*, Nov.-Dec. 1990, at 27.

Protective intervention would also be applied to prevent serious damage from improper

the elimination of the current status of protective laws as mere legal fiction, recognized in name only, without incidents or rights that provide adequate *de facto* protection.

II. WHY INTERVENTION IS NEEDED

There are many recent examples of failures to protect common cultural property. These situations provide a basis for the argument that the current protective regime, which does not authorize intervention, should be improved upon by adding the right of intervention in those limited circumstances where it is both necessary and possible to prevent further destruction.

A. Problems in Latin America

Despite existing laws for the protection of the common cultural heritage,¹⁵ one recent example of failure to protect common culture is found in the Mayan Indian ruins of Latin America. Spread over a geographic region that now includes several Central American states,¹⁶ the Mayan heritage is of common cultural significance to each of these states, including Mexico, Guatemala, El Salvador, Costa Rica, and Belize. In an effort to enhance their cooperative preservation effort, these five countries have agreed to join forces to promote and preserve the area in a multi-million dollar project intending to showcase the history and culture of the entire region as, in the words of the Mexican Minister of Tourism, "one entity without borders"¹⁷ While this agreement is not a binding international treaty, it is evidence of governmental recognition and opinion regarding Mayan culture among the five countries. Yet, recently the El Salvadoran government failed to prevent the United States from building a new \$80 million embassy on a Mayan village site, despite a detailed report in 1986 by El Salvador's National Museum that recommended the area be protected.¹⁸

activities regarding significant archaeological sites, such as the damage that occurred to two of Easter Island's most famous statues during the production of silicone molds by two German organizations, to be used in making replicas of the statues for a museum exhibition in Germany and Belgium. See *Easter Island Disaster*, *ARCHAEOLOGY*, Mar.-Apr. 1991, at 15, 71.

¹⁵ See *infra* parts V, VI.

¹⁶ Gutchen, *supra* note 11, at 284.

¹⁷ *Mundo Maya*, *ARCHAEOLOGY*, Mar.-Apr. 1991, at 14.

¹⁸ See *Land Developers Ruin Salvador Treasures*, (National Public Radio broadcast, Aug. 15, 1992). It was reported that:

Archaeologists say the site just west of San Salvador is potentially one of the most important in Central America The bulldozing went ahead despite a declaration by the government's National Council for Art and

This example can be interpreted as evidence that the current framework for protecting common cultural property often fails, — *i.e.* written reports and requests are ineffective in saving a culturally significant site. The concept of common heritage is a mere legal fiction in these situations. El Salvador is a signatory to the World Heritage Convention.¹⁹ Further, as a member of the Organization of American States, it adopted the Convention of San Salvador, the purpose of which is to safeguard the cultural heritage of the American nations.²⁰ Despite the fact that these five countries themselves have recognized their common Mayan heritage and cultural property, no apparent protective rights subsequently flow from this recognition for states other than El Salvador since international laws and treaties do not prevent destruction by the host state, or allow the other states the right to preserve the site. It is obvious to scholars that the San Salvador treaty has not been effective.²¹ As evi-

Culture in July that the site should be protected as a national treasure The new \$80 million United States Embassy is only a few hundred yards away. The fortresslike complex covers 26 acres and was supposed to have been modeled on a Mayan village. In fact, it was probably built on one.

Id. Despite the art council's declaration, the United States embassy staff "say that if the site had historical importance, they know nothing about it." *Id.* See also *In El Salvador, the Builders of a New Housing Subdivision are Being Accused of Destroying an Important Pre-Columbian City* . . . , (Monitor Radio broadcast, Sept. 18, 1992) [on file with *Case W. Res. J. Int'l L.*]. The destruction of Cuscatlan, the archeological site near the new United States embassy and former capital of the Aztec-related Pipil Civilization "underscored the El Salvadoran Government's inability or unwillingness to honor laws protecting ecological and historical sites." *Id.*

Indeed, the United States could be found to be one of the world's worst offenders in the preservation of common culture. For example, "experts estimate that fewer than 10% of the prehistoric Mimbres [Indian] sites in southwestern New Mexico are free from damage due to looting and vandalism." See Carol Ann Bassett, *The Culture Thieves*, SCIENCE, July-Aug. 1986, at 22, quoted in OFFICE OF TECHNOLOGY, UNITED STATES CONGRESS, TECHNOLOGIES FOR PREHISTORIC AND HISTORIC PRESERVATION 15 n. 5 (1986).

¹⁹ U.S. Dept. of State Treaties in Force, Jan. 1, 1993, at 420 (June, 1993). The 1972 Convention Concerning the Protection of World Cultural and Natural Heritage, Nov. 23, 1972, 27 U.S.T. 37, 40 (1972) [hereinafter World Heritage Convention], drafted under the direction of the United Nations Educational, Scientific and Cultural Organization (UNESCO) and signed by at least 107 states, recognizes "that deterioration or disappearance of any item of the cultural or natural heritage constitutes a harmful impoverishment of the heritage of all the nations of the world," and sets forth the strongest international protective regime for common cultural property. See discussion *infra* part VI(C).

²⁰ Convention on the Protection of the Archeological, Historical, and Artistic Heritage of the American Nations, June 16, 1976, art. 1, 15 I.L.M. 1350 (1976) [hereinafter Convention of San Salvador]; see also *infra* part VI(B)(2). The Convention has as its purpose to "safeguard the property making up the cultural heritage of the American nations in order . . . to promote cooperation among the American states for mutual awareness and appreciation of *their* cultural property." *Id.* (emphasis added).

²¹ James A.R. Nafziger, *International Penal Aspects of Protecting Cultural Property*, 19

denced by the failure of these existing treaties, a different normative principle providing rights of access and protective control is warranted under international law and should be developed.

B. Problems In Time of War

Despite numerous provisions in various treaties addressing the law of war providing for the protection of cultural objects,²² the climate and necessity of destructive combat continue to create situations where protection of cultural and historical sites, along with protection of the civilian population, for that matter, becomes subordinate or even nonexistent when weighed against the goals of a so-called military victory. When an archeological team visited Iraq in 1992, a year after the end of the "Dessert Storm" allied attack on that country in retaliation for its 1991 invasion and occupation of Kuwait, it found that Iraq's antiquities had been damaged by the Gulf War and subsequent civil unrest, and were continuously imperiled by the international embargo against Iraq.²³

As part of more generalized attacks on government institutions, many significant archeological sights were damaged, if not ruined, since "bombing Iraq is like blowing up the Louvre without hurting the paintings."²⁴ The city of Ur, near which an Iraqi air base had been located, had four bomb craters, and bullet holes pockmark the southeastern face of its most prominent feature, the ziqqurat dedicated to the Moon god

INT'L LAW. 835, 841 n.23 (1985) [hereinafter Nafziger, *International Penal Aspects*]. Nafziger finds support for his statement that "the Convention has not been effective" in the comments of Terence A. Todman, Ass't Secretary for Inter-American Affairs, Department of State, to Ambassador Rodolfo Silva, Chairman of the Permanent Council of Organization of American States, on August 26, 1977. Todman stated, "we believe the convention . . . is too broad in scope and rigid in its enforcement provisions It would impose an administrative burden on regional customs services which no state can be expected to accept and would also encourage the continued growth of a black market." *Id.*

²² See, e.g., Geneva Convention Relative to the Protection of Civilian Persons in Time of War, Aug. 12, 1949, art. 30, 6 U.S.T. 3516, 75 U.N.T.S. 287, 308; Hague Convention with Respect to the Laws and Customs of War on Land, July 29, 1899, 32 Stat. 1803; Hague Convention IV Respecting the Laws and Customs of War on Land, Oct. 18, 1907, art. 27, 36 Stat. 2277; Convention for the Protection of Cultural Property in the Event of Armed Conflict and Protocol, May 14, 1954, 249 U.N.T.S. 215, noted in Michael D. Diederich, Jr., "Law of War" and Ecology — A Proposal for a Workable Approach to Protecting the Environment Through the Law of War, 136 MIL. L. REV. 137, 146-47 (1992).

²³ *Mesopotamia in the Aftermath of the Gulf War*, ARCHEOLOGY, May-June 1992, at 24.

²⁴ Alan Sipress, *The Past and Present Collide in Iraq: Gulf War Rocks the Cradle of Civilization*, AKRON BEACON J., Jan. 21, 1991, at E2. "The landscape teems with ruins of mankind's earliest cities By the ruins of Ur, the ancient Mesopotamian city where Abraham is said to have been born, stands an Iraqi air base — a prime target for U.S. fighter bombers." *Id.*

Nanna.²⁵ Furthermore, in order to stave off mass starvation, agricultural and irrigation projects have cut into areas that would have previously been under archaeological surveys and international rescue efforts.²⁶ As could be expected in a time of war and breakdown in civil order, survival and safety of cultural property became subordinate to more fundamental concerns for survival of the population.²⁷ While military intervention was the proximate cause of this destruction, the initial placement of those military targets near such internationally significant cultural sites was the result of a domestic government without regard for any consequential infringement or destruction of the cultural interests of others. International protection of such universally important sites should have been insured prior to the opening of hostilities. Protective monitoring and intervention, where necessary, might have prevented using such cultural locations as military installations.²⁸

Similarly, the war in the former Yugoslavia has caused massive cultural destruction, to the point of being labelled "cultural genocide"

²⁵ *Mesopotamia in the Aftermath of the Gulf War*, *supra* note 23, at 24.

²⁶ *Id.* The detrimental effects on archeological preservation efforts are not limited to the country under attack. Jordan, dependent upon Iraq for most of its oil needs, was effectively cut off from that supply as a result of the United Nations trade embargo against Iraq. To alleviate its pressing need for oil, it commenced destructive oil-shale mining in a 100 square-mile area east of the Dead Sea. While this area contains some of Jordan's richest oil-shale deposits, it also is home to some 550 archeological sites, including 250,000-year-old Palaeolithic rock shelters and a twelfth century Crusader castle. Archaeologists attempting to minimize the destruction hope that Jordan remembers that this is "the world's heritage they are preserving in this cradle of civilization . . . [and] will do the right thing." *Salvaging Ruins in Jordan*, *ARCHAEOLOGY*, Jan.-Feb. 1993, at 23-24.

²⁷ "Under such circumstances, nobody in Iraq is particularly concerned with archaeology." *Mesopotamia in the Aftermath of the Gulf War*, *supra* note 23, at 24.

²⁸ While it is difficult to envision Iraq moving an air base because it was near an archeological site, this is precisely the argument that must be made. If the air base was specifically located because of its proximity to a site considered part of the world's heritage, world monitoring and protective intervention *prior* to times of war should attempt to cause the air base to be closed in order to ward off destruction of the cultural site. A better — and more realistic — way to accomplish protection, however, is to focus early world attention on acts against the world's common heritage, and coordinate some form of internationally sanctioned entry to inspect and stop the construction of an air base *before* it is completed on an important archeological site.

This argument is supported by those involved in archeological preservation: The Gulf War is not the first conflict in recent history to threaten archaeological sites. Our world patrimony has been under siege during 16 years of civil war in Beirut and during the decades of fighting in Vietnam and Cambodia. *We must demand that governments involved in future conflicts give assurance that cultural remains will be protected.*

Martha Sharp-Joukowsky, *From the President*, *ARCHAEOLOGY*, May-June 1991, at 6 (emphasis added).

when referring to the destruction of Sarajevo's churches, mosques, and libraries, many of which were built in the fourteenth and fifteenth centuries.²⁹ Croatia's Dubrovnik underwent similar havoc when, from October, 1991 to early 1992, Serbian shelling destroyed sixty-three percent of the city's available living space — over 461 houses or monuments — in this historical town considered one of the most outstanding historical towns in Europe, and included on the World Heritage List by UNESCO³⁰ as part of mankind's cultural heritage.³¹

Motivated by this mass destruction of common cultural property, the Italian government has proposed that U.N. inspectors monitor the world's cultural heritage, and that the international community share responsibility for cultural sites on UNESCO's World Heritage List of major monuments.³² It has been suggested that UNESCO be given powers similar to those of the inspectors of the International Atomic Energy Agency, including the power to enter sovereign territory, in order to check on the application of the 1972 World Heritage Convention.³³ Unfortunately, the Italians withdrew the proposal when it met stiff opposition from the Executive Board of UNESCO, particularly the Omani, Chinese, and Egyptian speakers at the meeting who indicated that their countries were unwilling to give up authority over their own territory or cultural treasures.³⁴ France, on the other hand, had a more favorable response to and recognition of the concept of protective intervention, indicating that it would support the concept of ideas but not policemen.³⁵ Of course, it is precisely this type of a non-military, protective international regulatory agency which was proposed by the Italians. The achievement of such a proposal is dependent upon increased international advocacy for a team of knowledgeable cultural property advisors with an internationally recognized right to enter, inspect, recom-

²⁹ Roger Boyes, *This is Cultural Genocide*, THE TIMES (London), Aug. 28, 1992.

³⁰ The 1972 World Heritage Convention, *supra* note 19, art. 11(2), provides that member states submit an inventory to the World Heritage Committee of their property "forming part of the cultural and natural heritage." Submissions of such inventories from member states comprise the World Heritage List, which is then distributed to members at least every two years. *Id.*

³¹ Jean-Paul Cadoret, *Shells Wreaked Havoc on Historic Port, Official Says*, AGENCE FRANCE PRESSE, Apr. 25, 1992, available in LEXIS, News Library, AFP File.

³² *Italy Drops Scheme for Monument Inspectors*, The Reuter Library Report, May 22, 1992, available in LEXIS, News Library, Reuwl File.

³³ Paul Taylor, *Italy Proposes U.N. Cultural Heritage Inspectors*, The Reuter Library Report, May 14, 1992, available in LEXIS, News Library, Reuwl File (indicating that "[o]ne might conceive of a system of actual protection, with a team of inspectors similar to the one created within the International Atomic Energy Agency . . . to check on the non-proliferation agreement[]").

³⁴ *Italy Drops Scheme for Monuments Inspectors*, *supra* note 32.

³⁵ *Id.*

mend, and implement protective action for the common cultural heritage of mankind.

III. ARGUMENTS AGAINST INTERVENTION: TERRITORIAL SOVEREIGNTY VS. COMMON CULTURAL PROPERTY

Cultural property, as the testimony of the creative genius and history of peoples, is a basic element of their identity.³⁶ Some believe that the solidarity of the international community, which has developed in recent decades, can be further intensified in both the political and humanitarian spheres by an increased concern for the protection of cultural property.³⁷ As a result, recognition of a duty to protect not only their own cultural property, but that of other nations as well, has led to increased international cooperation in the field of preservation.³⁸ Yet, most treaties³⁹ and customary international law⁴⁰ recognize the inalienability of property located within national boundaries, and a nation's superior claim to property when it is the country of origin.⁴¹

A. *The Tradition of Territorial Sovereignty*

The theory of territorial control over common cultural property, along with everything else within a state's political boundaries, developed from the nineteenth century idea of the nation-state and the relationship between the particular great powers of that time.⁴² The growth of classical international law reflecting the emphasis upon the nation and national territorial sovereignty is believed to have derived from political circumstances directly related to the nineteenth century function of international law of bringing a minimum order to relations between states by imposing certain restraints upon their sovereignty.⁴³ During the 18s the

³⁶ Koen De Jager, *Claims to Cultural Property Under International Law*, 1 LEIDEN J. INT'L L. 183, 190 (1988).

³⁷ J. Crabb, *International Humanitarian Law and the Protection of Cultural Property*, Y.B. INT'L INST. HUMANITARIAN L. 267, 269 (1986).

³⁸ Alan Marchisotto, Note, *The Protection of Art in Transnational Law*, 7 VAND. J. TRANSNAT'L L. 689, 717 (1974).

³⁹ See *infra* part VI.

⁴⁰ Among states "the recognition of the existing territorial link between the cultural property and a definitive territory has become a generally accepted principle of international law." De Jager, *supra* note 36, at 190.

⁴¹ See, e.g., Nafziger, *International Penal Aspects*, *supra* note 21, at 850 (indicating that "[i]nternational comity and conventional law vest legislative powers to protect cultural property in the state of origin[]").

⁴² Francois Duchene, *The Political Aspects of Intervention in Present Day International Politics II*, in INTERVENTION IN INTERNATIONAL POLITICS 92 (Louis G.M. Jaquet ed., 1971).

⁴³ HENRY J. STEINER & DETLEV F. VAGTS, TRANSNATIONAL LEGAL PROBLEMS 372-73

idea of sovereign, independent nation-states was greatly fortified by the spread of democratic concepts originating in the French and American revolutions, one consequence of which was to make external intervention in a country's internal arrangements an act hostile to that country's government, as well as an infringement on the right of self-determination of the people.⁴⁴

The United Nations Charter specifically addressed non-intervention in article 2(4) which states that "[a]ll Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations."⁴⁵ The 1965 U.N. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty further supported the law against intervention and was unanimously adopted by the General Assembly.⁴⁶

B. *New Norms of Intervention*

Regarding common cultural property, however, modern national and political boundaries have only limited relevance when it comes to the location of historical and archaeological remains.⁴⁷ The entire concept of culture defies using geopolitical boundaries as demarcations since culture is neither normally nor historically derived from a territory; rather, culture develops from the societal traditions of a people.⁴⁸ Current national boundaries often have no connection or alignment with the

(1986).

⁴⁴ Kenneth G. Younger, *Intervention: The Historical Development I*, in INTERVENTION IN INTERNATIONAL POLITICS, *supra* note 42, at 17.

⁴⁵ U.N. CHARTER, art. 2, ¶ 4.

⁴⁶ Karl Kaiser, *The Political Aspects of Intervention in Present Day International Politics I*, in INTERVENTION IN INTERNATIONAL POLITICS, *supra* note 42, at 84 (referencing the U.N. Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and Protection of Their Independence and Sovereignty).

⁴⁷ Henry Cleere, *Foreward* to PROTT & O'KEEFE, *supra* note 13, at vi.

⁴⁸ "One way of thinking about cultural property . . . is as components of a common human culture whatever their places of origin or present location, independent of property rights or national jurisdiction." John H. Merryman, *Two Ways of Thinking About Cultural Property*, 80 AM. J. INT'L L. 831, 831 (1986) [hereinafter Merryman, *Two Ways of Thinking*].

Cultural rights are considered human rights, not territorial rights, as evidenced by their mention in the United Nations Covenants on Human Rights. The International Covenant on Economic, Social, and Cultural Rights, part of the Covenants on Human Rights, "recognize[s] the right of everyone: (a) To take part in cultural life . . . [and] (c) To benefit from the protection of the moral and material interests resulting from any scientific, literary or artistic production of which he is the author." International Covenant on Economic, Social, and Cultural Rights, 1966, art. 15, 6 I.L.M. 360, 365.

peoples that inhabited the land in past centuries and left cultural clutter as evidence of their existence. Culture is defined by linguistic, religious, or other criteria, not by an artificially placed boundary line.⁴⁹

The Cold War and the nuclear age have contributed to the development and apparent acceptance of "minor coercion," or unarmed intervention, as opposed to the age-old but cruder forms of military intervention and physical coercion.⁵⁰ A common sense analysis indicates that the development of various forms of political coercion and intervention without the use of force in the nuclear age was both necessary and inevitable; the need to exercise restraint in the use of nuclear weapons was and remains mandatory for world preservation. From this and other modern trends, the evidence of a breakdown in the traditional concept of territorial sovereignty, when applied to non-military settings, is apparent.

In particular, claims for an uncompromising observance of the sovereignty of underdeveloped countries, often clash with the necessities required to induce social reform and economic efficiency. This suggests that intervention has become so frequent and varied in its forms of implementation that it is already an essential part of many structural elements of the contemporary international order.⁵¹ The sovereign state begins to take on less significance in international relations which frequently involve independent international players and global, as opposed to national, concerns.⁵² In the "highly individualistic" and "mass-consumer society" of the twentieth century, there are an infinite number of individual contracts made by persons or groups irrespective of national

⁴⁹ Thomas C. Carey, *Self-Determination in the Post-Colonial Era: Case of Quebec*, 1 AM. SOC. INT'L L.J. 47, 55 (1977).

⁵⁰ William T. Burke, *The Legal Regulation of Minor International Coercion: A Framework of Inquiry*, in *ESSAYS ON INTERVENTION* 63, 87 (Roland J. Stanger ed., 1964). In support of this line of reasoning, there is a belief among scholars that:

Since the 19th century's populist nation state became the 20th century's mass consumer society, the problem is not to 'stop' intervention but to turn it from a military or quasi-military force into a civilian process and from a civilian process in which there is a strong sense of exploitation into one of joint decision-making Final world-wide legal order can be furthered by constructive intervention of states or international organisations.

Louis G.M. Jaquet, *Introduction to INTERVENTION IN INTERNATIONAL POLITICS*, *supra* note 42, at vii.

⁵¹ Kaiser, *supra* note 46, at 83.

⁵² It is now recognized that "[t]he major structures and processes that affect us are global . . . [and] [t]he state is no longer the only great mediator between 'out there' and 'in here,' between foreign policy and domestic politics, between capital and labor, between First World and Third World, between self and other." R.B.J. WALKER, *ONE WORLD, MANY WORLDS: STRUGGLES FOR A JUST WORLD PEACE* 165 (1988).

frontiers or relationships not defined as any political body or state.⁵³ Further, the international arena is coming to realize that while states are by no means irrelevant, they "are becoming too big to respond to the needs of people[,] and too small to respond to the globalization of capital or the challenges of militarization and environmental collapse."⁵⁴

The protection of common cultural property easily falls into this category of challenges. As a result, the doctrine of unqualified condemnation of all forms of intervention should be replaced by a doctrine of conditional intervention,⁵⁵ particularly if common cultural property rights are to be recognized and enforceable. Despite provisions of the U.N. Charter concerning sovereign equality,⁵⁶ and despite what nations themselves believe, the fact remains that the world continues to be comprised of a stratified society⁵⁷ between developed and developing nations. A primary assumption underlying the doctrine of sovereign equality and nonintervention is that, to avoid outside interference, nations must be fully equipped to manage their own affairs.⁵⁸ While nations with an unfortunate economic past or with political handicaps can easily become victims of foreign exploitation,⁵⁹ their inhabitants — including people and common cultural property — can also be viewed as victims of location by virtue of finding themselves housed within that nation. If a nation is not fully equipped to manage common cultural property located within its territorial boundaries, its capacity as a sovereign equal becomes questionable under the standards of the international community.⁶⁰ Interference in the form of protective intervention becomes justifiable in such situations.⁶¹

⁵³ Duchene, *supra* note 42, at 93.

⁵⁴ WALKER, *supra* note 52, at 165.

⁵⁵ Kaiser, *supra* note 46, at 85.

⁵⁶ U.N. CHARTER, art. 2, ¶ 1 ("The Organization is based on the principle of the sovereign equality of all its Members.").

⁵⁷ RADHARAMAN CHAKRABARTI, *INTERVENTION AND THE PROBLEM OF ITS CONTROL IN THE TWENTIETH CENTURY* 209 (1974).

⁵⁸ *Id.* at 208.

⁵⁹ *Id.* at 209.

⁶⁰ *Id.*

⁶¹ Even if a country such as the United States is not considered ill-equipped to fund protective efforts yet fails to do so, *see supra* note 18, this argument holds true. Intervention is justifiable because any state that refuses to organize and/or allocate proper resources at levels meeting internationally desired standards for cultural protection is acting sub-equally to those who properly protect the cultural heritage. States that refuse should be subject to external interference in their internal operations and administration regarding common cultural property.

IV. MORE ARGUMENTS AGAINST INTERVENTION: NATIONAL PATRIMONY VS. COMMON CULTURAL PROPERTY

In addition to claims of territorial sovereignty as an argument against protective intervention, many nations claim that treasures located within their boundaries are part of their national patrimony⁶² rather than the common heritage of mankind.⁶³ Cultural heritage takes on particular significance in this manner with the lessor economically and politically developed states.⁶⁴ In its purest form, the concept of national cultural patrimony views cultural objects produced, or first discovered, within a state as belonging to that state based on the special relationship between that state's people and their cultural artifacts.⁶⁵ In fact, a basic principle of cultural property preservation is that cultural objects, as basic elements of civilization and national culture, can only be fully appreciated in close connection with accurate information as to their origin, history, and traditional status.⁶⁶

But often these claims are based on the mere physical presence of a work in the claiming country, without exclusive cultural attachment.⁶⁷

⁶² The word "patrimony" in a domestic context is used to mean property which has descended within the same family, in a direct line from the father, and by extension, from the mother, as well as the total mass of existing or potential rights and liabilities attached to a person for the satisfaction of his economic needs. BLACK'S LAW DICTIONARY 1015 (5th ed. 1979). Its use by legal scholars in an international context, preceded by the term "national" has apparently become a term of art in the discussion of international cultural property rights, as evidenced by its frequent use throughout the various articles and books consulted in preparation of this Note, and referenced herein.

"National patrimony" is interpreted by this author to mean the property rights of a nation as one international unit, including claims of control and ownership of cultural artifacts and sites with which that nation can trace an historical relationship through lineage or territory. Use of the term in this Note is based on this interpretation.

⁶³ Nafziger, *International Penal Aspects*, *supra* note 21, at 847.

⁶⁴

[T]he establishment of cultural identity in emergent nations is a fundamental one . . . constitut[ing] tangible and monumental proof of distinct nationhood. The constitutions of many of the "new" states of the postwar world contain comprehensive statutes asserting state ownership and control over all the vestiges of the past within their frontiers, whether "portable" or monumental, in private or in public hands.

PROTT & O'KEEFE, *supra* note 13, at v.

⁶⁵ Douglas N. Thomason, *Rolling Back History: The United Nations General Assembly and the Right to Cultural Property*, 22 CASE W. RES. J. INT'L L. 47, (1990). This explanation will be referred to as the "national patrimony doctrine."

⁶⁶ Nieciówna, *supra* note 6, at 249. See also *infra* note 166 (discussing the negative impact of "de-contextualization" on the archaeological and ethnological value of cultural property).

⁶⁷ Marchisotto, *supra* note 38, at 690.

As in the case of the Acropolis of Greece or the Great Pyramids of Egypt,⁶⁸ for example, or any other internationally significant sites within a given state, the weaknesses of the doctrine of national patrimony come to light: it could effectively cut off the bulk of humanity from exposure to that great civilization.⁶⁹ Under the national patrimony doctrine,⁷⁰ and its reliance on the law of the situs to govern access and protection of cultural property, other states cannot influence the fate of commonly significant property, despite the property's importance to the common heritage of mankind.⁷¹ This was painfully shown by the Chinese Cultural Revolution and its destructive effects on cultural property within the People's Republic.⁷²

Further support for national patrimony claims of control over cultural property comes from those politicians and historians who argue that pride in past achievements can increase the attachment of citizens to current social and political structures associated with that tradition.⁷³ Experience shows that politically motivated cultural associations may be argued from racial descent, territorial coincidence, or even from mere cultural sympathy.⁷⁴ Some observable examples in this century include Iran under the Shah, Kampuchea as heir to the Khmer culture, Israel as heir to Hebrew culture, and many modern African States.⁷⁵ Cultural

⁶⁸ See, e.g., De Jager, *supra* note 36, at 190-91. De Jager states that it is difficult if not impossible to determine which state is to be considered the country of origin. Is for example, modern Egypt the heir of the ancient art from that region? Or even less clear, who can claim the old Jewish art treasures from Eastern Europe: Poland, Israel or the Soviet Union?

Id. See also Merryman, *Two Ways of Thinking*, *supra* note 48, at 837 (stating that "[a]s the smog of Athens eats away the marble fabric of the Parthenon, all of mankind loses something irreplaceable[]").

⁶⁹ Thomason, *supra* note 65, at 94-95. Cf., comments of Dr. James W. Flanagan, Professor of Religion at Case Western Reserve University and active field archaeologist in Jordan, who indicated that the destructive use of archeological sites by the local population should always be within their prerogative, since such activity constitutes cultural evolution, not destruction. Interview with Dr. James Flanagan, Case Western Reserve University, in Cleveland, Ohio (Dec. 16, 1992).

⁷⁰ See *supra* note 65 and accompanying text.

⁷¹ De Jager, *supra* note 36, at 189.

⁷² *Id.*

⁷³ PROTTE & O'KEEFE, *supra* note 13, at 23-24. Dr. Caroline S. Steele, Post Doctoral Fellow in Religion at Case Western Reserve University and Mesopotamian archaeologist, agrees with this theory, indicating that the cultural heritage and archeological riches located in present-day Iraq are frequently used by Saddam Hussein and the Baat party as a tool of political unification. Interview with Dr. Caroline S. Steele, Post Doctoral Fellow in Religion at Case Western Reserve University, in Cleveland, Ohio (Dec. 16, 1992).

⁷⁴ PROTTE & O'KEEFE, *supra* note 13, at 23-24.

⁷⁵ *Id.*

association as a nationalistic medium can take on deep significance for the people of a country in terms of identification and unification.⁷⁶

To these ends, unfortunately, national patrimony is sometimes manipulated, its stories and history rewritten in efforts to use the past as propaganda for a current regime.⁷⁷ The National Socialist Regime in Germany under Hitler's Third Reich was notorious for its use and abuse of the past for imperialist and racist purposes, invoking the concept of *Kulturkreis*, the identification of ethnic regions based on excavated cultural materials, and then using this theory to support Nazi expansionist aims in central and eastern Europe.⁷⁸ The flaws inherent in basing cultural property rights on national patrimony arguments become even more evident in the context of such abusive examples as the Third Reich.⁷⁹

While nation-states, as the primary political category in international relations, may resolve the age-old tension between being a person and being part of a particular culture in a particular territory, the notion is considered an historically specific resolution, increasingly out of touch with contemporary realities.⁸⁰ Sometimes nationalistic claims by citizens of newly emerged states to preserve and retain their cultural heritage are dismissed by those in more settled conditions as "wholly selfish."⁸¹ Often the practice of hoarding cultural objects serves no discernible domestic purpose, other than asserting rights to keep them. The practice instead leads to multiple examples of artifacts of earlier civilizations being retained by nations, unavailable for study by domestic or foreign

⁷⁶ This was explained in the words of one Indian writer:

Archaeology has come to acquire for modern India a significance which is at once deeper and subtler than a strict definition of the term as a scientific discipline would seem to imply It has enabled her to establish her lost links with a great past whose magnificence was beyond her distant dreams It is something deeply rooted in the country's very existence, and constitutes almost a moral and spiritual necessity.

Id.

⁷⁷ See generally Bettina Arnold, *The Past as Propaganda*, *ARCHAEOLOGY*, July-Aug. 1992, at 30 (providing a brief historical summary of rulers who have manipulated cultural history for political ends, including the Persian ruler Darius I — 521-486 B.C.—, the first century Roman historian Tacitus, and Germany's Third Reich under Hitler from 1933 to 1945).

⁷⁸ *Id.*

⁷⁹ The Nazi Doctrine of Hitler was "ethnocentric, racist, and genocidal," in its belief that the Germanic culture of Europe was responsible for all major intellectual and technological achievements of Western civilization. German archaeological publications from 1933 to 1945 showed maps of the Germanic homeland as the "center of diffusionary waves bringing civilization to less developed cultures to the south, west, and east." *Id.* at 32. Hitler went so far as to refer to the Greeks "as Germans who had survived a northern natural catastrophe and evolved a highly developed culture in southern contexts." *Id.*

⁸⁰ WALKER, *supra* note 52, at 163-64.

⁸¹ PROTTE & O'KEEFE, *supra* note 13, at 25.

scholars, and contributing to the cultural impoverishment of people in other parts of the world.⁸² While this argument is generally raised in regards to moveable cultural property, it is equally applicable to immoveable monuments and archeological sites.

From the viewpoint of several culturally impoverished states, there was justification for these culturally isolationistic policies. Mexican law for example, explicitly states that archaeological objects are inalienable,⁸³ a legal scheme prompted by the Mexican experience with the "wholesale dismemberment" of its ancient pre-Columbian sites.⁸⁴ For similar reasons, Peru also retains works of earlier cultures that it does not adequately conserve or display, thus endangering mankind's cultural heritage in "destructive retention" or "covetous neglect," according to some.⁸⁵

It is generally acknowledged that the role of colonialism in depleting the cultural resources of Africa explains developing nations' isolationistic focus, as was Zaire's during the U.N. General Assembly discussion of the 1970 UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property.⁸⁶ In the words of President Mobutu:

During the colonial period we suffered not only from colonialism, slavery, economic exploitation, but also and above all from the barbarous systematic pillaging of all our works of art. In this way the rich countries appropriated our best, our unique works of art, and we are therefore poor not only economically but also culturally . . .⁸⁷

Further support for this argument is evidenced by the fact that the museums of Europe and the United States are filled with artifacts looted by soldiers, colonial administrators, explorers, archaeologists, or treasure-hunting entrepreneurs.⁸⁸

⁸² Merryman, *Two Ways of Thinking*, *supra* note 48, at 847.

⁸³ Marchisotto, *supra* note 38, at 711.

⁸⁴ *Id.*

⁸⁵ Merryman, *Two Ways of Thinking*, *supra* note 48, at 846.

⁸⁶ Thomason, *supra* note 65, at 50 (referencing the 1970 UNESCO Convention on the Illicit Movement of Art Treasures, Nov. 14, 1970, 823 U.N.T.S. 231).

⁸⁷ *Id.*

⁸⁸ Cleere, *supra* note 47, at v. Cleere indicates that "[t]he serious student of the Sumerians or the Maya, the Egyptians or the Khmer, finds his finest raw material in Paris or London, Philadelphia or Berlin." *Id.*

See also Ann P. Prunty, *Toward Establishing an International Tribunal for the Settlement of Cultural Property Disputes: How to Keep Greece From Losing its Marbles*, 72 GEO. L.J. 1155, 1155 (1984) (providing a discussion of the attempts by Greece to obtain the return of the "Elgin Marbles" — statues, friezes, and metopes from the Parthenon and other Athenian buildings —

In view of the negative isolationist effects on common cultural property that can result from policies based on the doctrine of national patrimony emphasized in existing cultural treaties,⁸⁹ it is time to balance this nationalistic legal focus with a framework that openly sanctions rights of intervention. The protective trend in cultural property law that began during the 1970s in an effort to stop foreign looting and exploitation⁹⁰ should continue. But, there are other risks created by such isolationism: such as failure by that host state to provide adequate protection to common cultural property, while excluding other states and interest groups from assisting in preventing its destruction.⁹¹ Providing a better balancing under international norms addressing common cultural property is warranted where such risks become reality.

An unfortunate result of such foreign exploitation has been retaliation by some host countries who have excluded foreign scholars.⁹² The concept of common cultural property, however, demands recognition of a dual accountability by host nations — both of its own cultural heritage, and of the heritage of all mankind.⁹³ Advocates of the principal of common cultural heritage believe that property is most valuable in its contributions to understanding universal human culture; the claim of the states of origin becomes secondary to the human interest in the common history.⁹⁴ The importance of great archaeological treasures, such as the Parthenon in Athens,⁹⁵ to modern cultural life gives all societies a spe-

which were removed a century-and-a-half ago by Lord Elgin, then British Ambassador to Constantinople, and which remain housed in the British Museum).

⁸⁹ See *infra* parts V, VI.

⁹⁰ See *infra* part VI.

⁹¹ See, e.g., Merryman, *Two Ways of Thinking*, *supra* note 48, at 846 (indicating by way of example that "Peru retains works of earlier cultures that, according to newspaper reports, it does not adequately conserve or display[]"). While this is an example of moveable cultural property, the thought process of cultural nationalism undoubtedly applies equally to nonmoveable cultural objects. It is noted that in the case of moveable cultural objects like those in Peru, "[t]o a cultural nationalist the destruction of national cultural property through inadequate care is regrettable, but might be preferable to its 'loss' through export." *Id.* One wonders if intervention to assist in preservation would be more acceptable than loss to destruction, however, since there is no attempt to remove or export the cultural objects. Cultural nationalists might not, in the end, put forth such strong resistance as anticipated as long as the property is not leaving their country.

⁹² Coggins, *supra* note 2, at 265 (stating, "[o]ne disastrous corollary of such exploitation arises when the aggrieved country retaliates by excluding American scholars, as has happened selectively in Turkey and may soon happen in India[]").

⁹³ Marchisotto, *supra* note 38, at 690 (indicating that "[s]tates are responsible, however, not only to their own people, but also to the broader civilization of which they are a part[]").

⁹⁴ Thomason, *supra* note 65, at 48.

⁹⁵ The Parthenon, dating to the mid-fifth century B.C., has been described as "the most cherished monument of Western civilization." Spencer P.M. Harrington, *Shoring Up The Temple of Athena*, *ARCHAEOLOGY*, Jan.-Feb. 1992, at 30, 32.

cial interest in their preservation, to the subordination of conventional property concepts.⁹⁶ This includes notions of traditional private property rights under domestic law,⁹⁷ and the concept of territorial sovereignty under international law,⁹⁸ both of which support the right to exclude anyone or anything from interfering with a recognized property right. However, based on the recognized international importance of the cultural heritage of mankind, the unrestricted alienation of culturally important property by a host state can no longer automatically be assumed.⁹⁹

V. EARLY PROTECTIVE EFFORTS FOR CULTURAL PROPERTY: RIGHTS IN THE CONTEXT OF WAR

In order to track the foundations for arguments favoring protective cultural rights of intervention, it is first necessary to survey the historical development of cultural property law. Although the existing body of international law addressing protection of cultural property is not fully evolved, the world community has been developing a protective regime for cultural property over many centuries. Evidence of concern for the protection of archeological and cultural property can be found as far back as a 1425 Papal decree ordering the demolition of buildings which were likely to cause damage to ancient monuments.¹⁰⁰ However, concern evidenced by the growth of numerous multilateral, regional, and bilateral treaties addressing protection of cultural property, has taken on a global focus only with the onset of the twentieth century.¹⁰¹ These

⁹⁶ Marchisotto, *supra* note 38, at 689.

⁹⁷ Blackstone has described property as "that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe" See PAUL GOLDSTEIN, *REAL PROPERTY* 4-5 (1984) (quoting Lord Blackstone).

⁹⁸

At the basis of international law lies the notion that a state occupies a definite part of the surface of the earth, within which it normally exercises, subject to the limitations imposed by international law, jurisdiction over persons and things to the exclusion of the jurisdiction of other states. When a state exercises an authority of this kind over a certain territory it is popularly said to have "sovereignty" over the territory Territorial sovereignty bears an obvious resemblance to ownership in private law . . . [E]arly international law borrowed the Roman rules for the acquisition of property.

J.L. BRIERLY, *THE LAW OF NATIONS* 142 (4th ed. 1949).

⁹⁹ Marchisotto, *supra* note 38, at 689.

¹⁰⁰ LYNDAL V. PROTT & P.J. O'KEEFE, *LAW AND THE CULTURAL HERITAGE* 34 (1984).

¹⁰¹ See, Merryman, *Two Ways of Thinking*, *supra* note 48, at 833-35 (discussing the historical development of the law of war and cultural property in international treaties). The 1972 World Heritage Convention, *supra* note 19, is the pinnacle of international cooperation regarding protection of the world's cultural heritage.

agreements, which comprise the body of public international law recognizing and addressing cultural property, have their roots in the law of war.¹⁰² Significantly, none of the existing treaties specifically authorizes a right of intervention in the national policies of a host state which fails to provide adequate protection for culturally important property.

In addition to the 1425 Papal order, other protective legislation is of comparable antiquity, such as a 1462 Papal Bull of Pius II which protected monuments from the past, and a 1666 Royal Proclamation which forbade the destruction of ancient monuments and relics of Sweden.¹⁰³ Other than these few isolated measures, however, most European countries did not take steps to protect cultural property until the late nineteenth century; outside Europe there was no comparable evolutionary process at all.¹⁰⁴ As a result, until the late nineteenth century there was no developed body of international law to protect cultural property from looting by victors during time of war,¹⁰⁵ a common practice among conquering armies who believed "to the victor go the spoils."¹⁰⁶ Early signs of an ethical attitude toward a country's cultural property during war did arise and begin to crystalize into something resembling law in the eighteenth century when Napoleon took the trouble to "legalize" his plunder of Italian art by expressly providing for the taking in the treaties imposed on the surrendering Italians.¹⁰⁷

For the most part, therefore, the law surrounding the protection of cultural property has its origins in the law of war as more specifically developed in the Lieber Code of 1863.¹⁰⁸ At the request of the General-in-Chief of the Union Armies during the American Civil War, Francis Lieber, a German emigre professor at Columbia College in New York, prepared the Instructions for the Governance of Armies of the United States in the Field, which in articles 34-36 provided for the protection of cultural property.¹⁰⁹ Throughout the late nineteenth century, the law

¹⁰² Merryman, *Two Ways of Thinking*, *supra* note 48, at 833.

¹⁰³ Cleere, *supra* note 47, at v.

¹⁰⁴ *Id.*

¹⁰⁵ MERRYMAN & ELSÉN, *supra* note 1, at 14.

¹⁰⁶ Jamison K. Shedwill, *Is the "Lost Civilization" of the Maya Lost Forever?: The U.S. and Illicit Trade in Pre-Columbian Artifacts*, 23 CAL. W. INT'L L.J. 227, 227 (1992).

¹⁰⁷ MERRYMAN & ELSÉN, *supra* note 1, at 14.

¹⁰⁸ Merryman, *Two Ways of Thinking*, *supra* note 48, at 833.

¹⁰⁹ Article 34 stated that "[a]s a general rule, the property belonging to . . . establishments of education . . . whether public schools, universities, academies of learning or observatories, museums of the fine arts, or of scientific character — such property is not to be considered public property [available for seizure]." *Id.* Article 35 stated that "[c]lassical works of art, libraries, scientific collections, or precise instruments, such as astronomical telescopes, as well as hospitals, must be secured against all avoidable injury . . ." *Id.*

concerning belligerents continued to include provisions for the protection of cultural property, as evidenced in the 1874 "Declaration of Brussels" which was promulgated at a conference of fifteen states at the instance of Russia.¹¹⁰

These international principles forbidding cultural plunder in times of war were later confirmed and amplified at the Hague conferences of 1899 and 1907 "in what was in effect a Magna Carta [*sic*] not for man himself but for his finest achievements, for those objects which mark his ascendancy, dignity, and purpose."¹¹¹ It is generally thought that these conventions merely restated earlier treaties concerning cultural property, were subject to an overriding concession to military necessity, and thereby provided only limited coverage;¹¹² however, they generally recognized that seizure of cultural property by a conquering or occupying power would no longer be tolerated.¹¹³

Until the 1930s, the protection of cultural property was merely one topic among the many provisions of the Lieber Code and its progeny, the main purpose of which was to deal comprehensively with the law of war and the obligations of belligerents.¹¹⁴ However, during the 1930s for the first time international interest turned to the preparation of a convention that dealt solely with the protection of cultural property, yet still in the context of time of war.¹¹⁵ This resulted in the Treaty on the Protection of Artistic and Scientific Institutions and Monuments promulgated in 1935 by 21 American nations, also referred to as the Roerich Pact, which regarded cultural property as neutral territory during time of war.¹¹⁶ This treaty was superseded in 1939 by the Draft Declaration and a Draft International Convention for the Protection of Monuments and Works of Art in Time of War, issued under the auspices of the League of Nations by the governments of Belgium, Spain, the United States, Greece, and the Netherlands.¹¹⁷ The focus of these treaties was

¹¹⁰ Article 8 of that Declaration provides that "[e]very seizure, destruction of, or wilful damage to . . . historical monuments, or works of art or science, shall be prosecuted by the competent authorities." *Id.* at 834.

¹¹¹ MERRYMAN & ELSEN, *supra* note 1, at 41.

¹¹² Merryman, *Two Ways of Thinking*, *supra* note 48, at 835.

¹¹³ De Jager, *supra* note 36, at 186.

¹¹⁴ Merryman, *Two Ways of Thinking*, *supra* note 48, at 835.

¹¹⁵ *Id.*

¹¹⁶ Treaty on the Protection of Artistic and Scientific Institutions and Monuments, Apr. 15, 1935, 49 Stat. 3267, 167 L.N.T.S. 279; *see also* Merryman, *Two Ways of Thinking*, *supra* note 48, at 835; De Jager, *supra* note 36, at 185.

¹¹⁷ *See* Merryman, *Two Ways of Thinking*, *supra* note 48, at 835 (citing the League of Nations Draft Declaration and a Draft International Convention for the Protection of Monuments and Works of Art in Time of War, 1 U.S. Dep't of State, Documents and State Papers 859

actually to limit intervention by conquering forces in order to save cultural property.

These efforts by the League of Nations in the late 1930s, however, were soon overtaken by the events of World War II and the changes in the technology, tactics, and strategy of warfare. The new concept of "total war" showed that the rules concerning protection of cultural property against belligerent acts had become clearly inadequate.¹¹⁸ To eliminate this inadequacy, the 1954 Convention on the Protection of Cultural Property in the Event of Armed Conflict was developed in the post-war era to firmly establish the importance of a nation's artistic treasures not only to that nation, but to the entire world.¹¹⁹ The significance of the Hague 1954 Cultural Property Convention was that for the first time, there was a wide recognition among nations that each holds and administers its cultural treasures at least in part for the common good of the entire world.¹²⁰

VI. THE SEARCH FOR COMMON CULTURAL PROPERTY RIGHTS IN THE TWENTIETH CENTURY'S PROTECTIVE LEGAL FRAMEWORK

A. *The Early Works of UNESCO and the Hague 1954 Cultural Property Convention*

Since World War II, international law regarding cultural property has continued to develop both inside and outside the context of war. The concept of common property was surfaced in many post-war treaties. The primary contributor to the establishment of a body of international cultural property law has been UNESCO, whose Constitution provides that one of its purposes is to "maintain, increase and diffuse knowledge . . . by assuring the conservation and protection of the world's inheritance of books, works of art and monuments of history and science, and recommending to the nations concerned the necessary international conventions."¹²¹ The establishment of UNESCO in 1946 and its subsequent efforts led to the signing of the Hague 1954 Cultural Property Convention,¹²² the language of which includes the first extended definition of cultural property found in international agree-

(1949)).

¹¹⁸ *Id.*

¹¹⁹ Convention for the Protection of Cultural Property in the Event of Armed Conflict, May 14, 1954, 249 U.N.T.S. 240 [hereinafter Hague 1954 Cultural Property Convention].

¹²⁰ Marchisotto, *supra* note 38, at 706.

¹²¹ Gerard Bolla, *Keynote Address*, in *Symposium on International Art Law*, 15 N.Y.U. J. INT'L L. & POL. 765, 765 (1983).

¹²² *Id.* at 765-66.

ments.¹²³ While the Hague 1954 Cultural Property Convention does not specifically distinguish between cultural objects of purely local interest and those of truly international importance,¹²⁴ it impliedly creates the concept of common cultural property in its preamble by emphasizing that damage to any cultural property is damage to the cultural heritage of mankind.¹²⁵ Any nationalistic or exclusionary claims to cultural property based merely on territorial location would seem to fail under such language of the Convention.

The contracting parties to the Hague 1954 Cultural Property Convention further recognized the damage to cultural property suffered during World War II and the increasing danger of destruction from the developing techniques of warfare.¹²⁶ Although the Hague 1954 Cultural Property Convention specifically addressed protection in the context of armed conflict, it was the precursor to international thought that a duty to protect cultural treasures exists in times of peace as well as in times of war.¹²⁷ This is interpreted to mean that a nation may not secret its holdings during peacetime, but must provide reasonable access for schol-

¹²³ Article 1 provides:

[T]he term 'cultural property' shall cover, irrespective of origin or ownership:

(a) movable or immovable property of great importance to the cultural heritage of every people, such as monuments of architecture, art, or history, whether religious or secular; archaeological sites; groups of buildings which, as a whole, are of historical or artistic interest; works of art; manuscripts, books and other objects of artistic, historical or archaeological interest; as well as scientific collections and important collections of books or archives or of reproductions of the property defined above;

(b) buildings whose main and effective purpose is to preserve or exhibit the movable cultural property defined in sub-paragraph (a) such as museums, large libraries and depositories of archives, and refuges intended to shelter, in the event of armed conflict, the movable cultural property defined in sub-paragraph (a);

(c) centres containing a large amount of cultural property as defined in sub-paragraphs (a) and (b), to be known as "centres containing monuments."

Hague 1954 Cultural Property Convention, *supra* note 119, art. 1.

¹²⁴ Merryman, *Two Ways of Thinking*, *supra* note 48, at 837 n.21.

¹²⁵ This is set forth by the contracting parties who were "convinced that damage to cultural property belonging to *any people whatsoever* means damage to the cultural heritage of all mankind, since each people makes its contribution to the culture of the world." Hague 1954 Cultural Property Convention, *supra* note 119, pmb. (emphasis added).

¹²⁶ The preamble states "that cultural property ha[d] suffered grave damage during recent armed conflicts and that, by reason of the developments in the technique of warfare, it is in increasing danger of destruction." *Id.*

¹²⁷ Marchisotto, *supra* note 38, at 706.

ars and for the general public, as part of its responsibilities to preserve and protect cultural property located within its territory.¹²⁸

The Hague 1954 Cultural Property Convention sought to protect property of great importance to the cultural heritage of all people by recognizing that nations have a duty in the administration of their cultural treasures not only to their own nationals, but to mankind as well.¹²⁹ The treaty has been described as international legislation that supports the concept of "cultural internationalism,"¹³⁰ or in other words, a common heritage of all mankind. Such treaty language making reference to cultural property held for "a common good," gives force to the idea that humanity is the true party in interest, independent of nations and international arrangements.¹³¹ Further, it recognizes that cultural property has importance to the world as a whole, justifying special international and domestic legal measures to ensure its preservation.¹³² Under this line of thought, such special legal measures can be interpreted and expanded to include rights of protective intervention for the common good of all mankind.

According to former UNESCO Assistant Director-General for Communications, Gerard Bolla, the Hague 1954 Cultural Property Convention is "sometimes called the 'Red Cross' of monuments and museums in time of war."¹³³ This description is based on its somewhat successful application in a number of armed conflicts; for example, in the Middle East conflicts between India and Pakistan, and between Iraq and Iran.¹³⁴ In view of its limited success in the past, it might have been applied in the Gulf War of 1990-91, as well as the Croatian-Serbian conflicts in the former Yugoslavia.¹³⁵ The ineffectiveness of the Hague

¹²⁸ *Id.*

¹²⁹ *Id.*

¹³⁰ Merryman, *Two Ways of Thinking*, *supra* note 48, at 842 (indicating that the Hague 1954 Cultural Property Convention "is a piece of international legislation that exemplifies an influential way of thinking about cultural property, which I will call 'cultural internationalism[]'").

¹³¹ *Id.* at 842 n.37.

¹³² *Id.* at 841.

¹³³ Bolla, *supra* note 121, at 766 (indicating that in 1983, seventy-one states were parties to Hague 1954 Cultural Property Convention).

¹³⁴ *Id.* at 766.

¹³⁵ See *supra* part II. Shortly after the invasion of Kuwait by Iraq, UNESCO sent letters to both governments reminding them of their responsibilities as parties to the Hague 1954 Cultural Property Convention. Arlene K. Fleming, *Securing Sites in Time of War*, *ARCHAEOLOGY*, May-June 1991, at 43.

Further, the intentional shelling of historic sites bearing the bright blue and white Hague Convention flag in Croatia was "a clear violation of the Hague Convention . . . which was ratified by UNESCO in 1954 and signed by Yugoslavia in 1955," according to Croatian authorities who further indicated that the Serbian army "has transformed monuments into enemies, for-

1954 Cultural Property Convention in these situations can be attributed to its failure to provide rights of protective intervention to states not parties to the conflict. While non-warring states have an interest in the world's common cultural property being destroyed by the warring states, the warring states have either refused to recognize their protective duties under the Hague 1954 Cultural Property Convention, or are not even members to the treaty. The enforcement mechanisms of the treaty are suspect given this weakness in its ability to ultimately protect the common heritage of mankind.¹³⁶

The Hague 1954 Cultural Property Convention does provide for the establishment of special refuges and protective centres during armed conflict for immovable cultural property of "very great importance," and specifically states that the guarding of this cultural property by armed custodians is not considered use of armed force for military purposes.¹³⁷ The Convention also provides for transport of cultural property to another territory under the international supervision of "Protecting Powers;" that is representatives, appointed by each contracting party, who will act on behalf of the parties involved in the conflict to protect any cultural property removed to a temporary refuge.¹³⁸ Therefore, the Hague 1954 Cultural Property Convention does make orchestrations at establishing a protective cultural property regime under the joint efforts of all signatories during times of war, including conflicts not of an international character.¹³⁹ It also provides that UNESCO may offer its services to the parties in conflict.¹⁴⁰ The roots for protective intervention can be found in these special provisions permitting armed guards, protective removal, and UNESCO interference.

But if the parties involved in conflict are not themselves contracting parties to the Hague 1954 Cultural Property Convention, it leaves other interested states without effective recourse against the destructive effects of warfare on their common cultural property. Without any treaty-sanctioned ability for the rest of the world to intervene, the language of the Hague 1954 Cultural Property Convention remains idealistic dialogue - an example of good international intent among the contracting parties,

getting that palaces, museums, and churches belong to everyone." *Crisis in Croatia*, *ARCHAEOLOGY*, Mar.-April 1992, at 21.

¹³⁶ Although the United States never ratified the Hague 1954 Cultural Property Convention, it was a signatory. In addition, among the 77 nations who have ratified the Hague 1954 Cultural Property Convention are several of the countries involved in the Gulf War: Egypt, France, Iraq, Italy, Kuwait, Morocco, Saudi Arabia, Syria, and Turkey. Fleming, *supra* note 135, at 43.

¹³⁷ Hague 1954 Cultural Property Convention, *supra* note 119, arts. 4, 8(1).

¹³⁸ *Id.* arts. 1, 2, 11.

¹³⁹ *Id.* art. 19.

¹⁴⁰ *Id.* art. 19(3).

but without effective results or remedies when put to the test in the reality of modern warfare. In this respect, it appears little more effective than its predecessor agreements developed by the League of Nations,¹⁴¹ as proven by the destructive battles of the past two years in Eastern Europe and Iraq. If the Hague 1954 Cultural Property Convention were truly the Red Cross of monuments, it should include similar rights of protective entry as the Red Cross enjoys in its humanitarian missions.

B. Regional Cultural Property Law

1. Protecting Cultural Property in Europe

Shortly after the development of the Hague 1954 Cultural Property Convention by UNESCO, the European Community (E.C.) took steps to memorialize this belief in a common heritage, drafting the European Cultural Convention to "safeguard and to encourage the development of . . . national contribution to the common cultural heritage of Europe."¹⁴² This was one of the first treaties to address the problem of protecting common culture in times other than during war. While it does not contain a detailed definition of cultural property as in the Hague 1954 Cultural Property Convention, it does specifically recognize a "common cultural heritage of Europe."¹⁴³ The meaning of this term, however, can be derived from the preamble of the Convention where the Governments of the signatory parties "resolved to conclude a general European Cultural Convention designed to foster among the nationals of all Members . . . the study of the *languages, history and civilisation of the others and of the civilisation which is common to them all*."¹⁴⁴

Not only did the convention recognize the concept of common cultural property, it also recognized a right of access to such property by stating that each contracting party shall "regard the objects of European cultural value placed under its control as integral parts of the common cultural heritage of Europe, shall take appropriate measures to safeguard them and *shall ensure reasonable access thereto*."¹⁴⁵ Can this clause allowing "reasonable access" be interpreted to permit intervention without permission if one European state is not protecting cultural property considered of importance to the rest of Europe? The concept of intervention appears to find roots in such permissive language.

¹⁴¹ See *supra* notes 117-18 and accompanying text.

¹⁴² European Cultural Convention, Dec. 19, 1954, art. I, 218 U.N.T.S. 139 (1955).

¹⁴³ See *id.*

¹⁴⁴ *Id.* pmbl. (emphasis added).

¹⁴⁵ *Id.* art. 5 (emphasis added).

The E.C. continued its efforts in advancing the notion of a common European culture with several later treaties which recognized a "common heritage,"¹⁴⁶ a "European cultural heritage,"¹⁴⁷ and "a common heritage of all Europeans."¹⁴⁸ The Council of Europe's 1985 Convention on Offences Relating to Cultural Property further focused attention on the problem and on the concept of common cultural heritage of Europe.¹⁴⁹

The 1985 Convention for the Protection of the Architectural Heritage of Europe appears to be one of the first, and possibly only, international agreements that provides permission to public authorities within each state "to require the owner of a protected property to carry out work or to carry out such work itself if the owner fails to do so," and "allows compulsory purchase of a protected property."¹⁵⁰ One begins to see a breakdown in traditional property concepts when dealing with cultural property. The treaty is recognizing a right of intervention on a domestic level in private property rights for the benefit of preserving cultural property of significance to the entire state. This concept is ex-

¹⁴⁶ European Convention on the Protection of the Archaeological Heritage, May 6, 1969, pmbl., Europ. T.S. No. 66, reprinted in 8 I.L.M. 736 (1969). The Convention considers "archaeological objects" to be "all remains and objects, or any other traces of human existence, which bear witness to epochs and civilizations for which excavations or discoveries are the main source or one of the main sources of scientific information." *Id.* at 737. It does not specifically define "common heritage", however, or clarify if all such objects are part of the common heritage discussed in the preamble.

¹⁴⁷ European Convention on Offences Relating to Cultural Property, June 23, 1985, pmbl., 25 I.L.M. 44 (1986). Appendix II of the Convention provides a detailed description of the cultural property to which the Convention applies. *Id.* at 53.

¹⁴⁸ Convention for the Protection of the Architectural Heritage of Europe, Oct. 3, 1985, pmbl., 25 I.L.M. 380. Article 1 of the Convention defines "architectural heritage" to include:

1. Monuments: all buildings and structures of conspicuous historical, archaeological, artistic, scientific, social or technical interest, including their fixtures and fittings;
2. Groups of buildings: homogeneous groups of urban or rural buildings conspicuous for their historical, archaeological, artistic, scientific, social or technical interest which are sufficiently coherent to form topographically definable units;
3. Sites: the combined works of man and nature, being areas which are partially built upon and sufficiently distinctive and homogeneous to be topographically definable and are of conspicuous historical, archaeological, artistic, scientific, social or technical interest.

Id. at 381.

¹⁴⁹ Nafziger, *International Penal Aspects*, *supra* note 21, at 835 (referencing the Draft Convention on Offenses Relating to Cultural Property which has since been adopted as the final 1985 Convention).

¹⁵⁰ Convention for the Protection of the Architectural Heritage of Europe, *supra* note 148, at 381.

pandable to the international arena as well, supporting a right of intervention on an international level in the territorial property rights of a state for the benefit of preserving cultural property of significance to the entire world.

Among national legal schemes regarding cultural property law within this European framework, Italy has the "most ambitious protection regime in the world."¹⁵¹ It is an example of a state with a strong commitment to concepts of private property, yet which is prepared to make exceptions for the sake of the cultural heritage.¹⁵² Its 1939 Law on the Protection of Objects of Artistic and Historic Interest, which still is in force,¹⁵³ actually preceded the European movement on protection of cultural property. The Italian Government identifies all objects of interest and significance to the nation, whether in private or public hands, and the Ministry of National Education provides directly for necessary conservation measures on all property.¹⁵⁴ While private owners are expected to reimburse the state for conservation measures undertaken, if the owner cannot afford the upkeep, the burden is assumed by the state — which also has the right to acquire the work after duly compensating the owner.¹⁵⁵ In this manner, the state assumes the role of guardian over endangered objects, and can specify protectionary measures for cultural property.¹⁵⁶

However, like the 1985 Convention for the Protection of the Architectural Heritage of Europe the Italian scheme merely permits domestic intervention without recognizing an international right of protection of privately owned cultural property. Nations claiming a common interest in any Italian cultural property and advocating improved preservation efforts, cannot find express support for their claims in the Italian or European legal regime. The laws do not provide for effective safeguards or protective rights by those outside the domestic legal jurisdiction. But this domestically recognized right of intervention in private property rights is transferrable to an international level. The norms are in existence; they need only be advocated and emphasized by an appropriate international body and its member states so as to rise to the level of international custom and law.

On the other hand, while the Italian approach strengthens an argu-

¹⁵¹ Marchisotto, *supra* note 38, at 709.

¹⁵² PROTT & O'KEEFE, *supra* note 13, at 188.

¹⁵³ *Id.*

¹⁵⁴ Marchisotto, *supra* note 38, at 708.

¹⁵⁵ *Id.*

¹⁵⁶ James A.R. Nafziger, *Comments on the Relevance of Law and Culture to Cultural Property Law*, 10 SYRACUSE J. INT'L L. & COM. 323, 332 (1983).

ment for departure from traditional property norms, some have suggested its actual effect is not as desirable as one might think. Instead of improving the preservation environment, the laws can cause local farmers who discover archeological sites on their property to quickly plunder and sell artifacts without notifying authorities — primarily out of fear that their farms will be taken for inadequate compensation, or out of emotional desires to maintain ownership of their family homesteads.¹⁵⁷ The same holds true on an international level, where countries will refuse to recognize and identify important cultural sites out of fear of international exposure and possible intervention. The search for common cultural property laws involves a difficult balancing of these interests.

2. Protecting Cultural Property in Latin America

During the 1970's, the American states began to recognize and address their common cultural heritage. The previously mentioned Convention of San Salvador was a response to the "continuous looting and plundering of the native cultural heritage suffered by the countries of the hemisphere."¹⁵⁸ With particular concern for the Latin American countries, the Convention recognized that "there is a basic obligation to transmit to coming generations the legacy of their cultural heritage."¹⁵⁹

It should be noted, however, that although the Convention seemingly recognizes common American cultural property, it approaches protection from a purely domestic perspective. Despite liberal wording favoring "a framework of the soundest inter-American cooperation"¹⁶⁰

¹⁵⁷ Interview with Dr. David Brose, Chief Curator of Archaeology, Cleveland Museum of Natural History, in Cleveland, Ohio (Nov. 11, 1992).

¹⁵⁸ Convention of San Salvador, *supra* note 20, pmbl. See also *supra* note 11.

¹⁵⁹ *Id.* art. 1. The Convention gives a definition of cultural property in article 2:

- a. Monuments, objects, fragments of ruined buildings, and archeological materials belonging to American cultures existing prior to contact with European culture, as well as remains of human beings, fauna, and flora related to such cultures;
- b. Monuments, buildings, objects of an artistic, utilitarian, and ethnological nature, whole or in fragments, from the colonial era and the Nineteenth Century;
- c. Libraries and archives; incunabula and manuscripts; books and other publications, iconographies, maps and documents published before 1850;
- d. All objects originating after 1850 that the States Parties have recorded as cultural property, provided that they have given notice of such registration to the other parties to the treaty;
- e. All cultural property that any of the States Parties specifically declares to be included within the scope of this convention.

Id. art. 2.

¹⁶⁰ *Id.* pmbl.

it expressly provides that regulations on ownership, transfer, and thus protection of cultural property "shall be governed by domestic legislation,"¹⁶¹ thereby recognizing the ultimately exclusive jurisdiction of domestic law over protective efforts. At the same time, its idyllic preamble provisions regarding the "Heritage of the American Countries" is contradicted by the express wording of the treaty body which entitles each state to recognize property found or created in its territory as the "cultural heritage of each state," and makes no mention of common rights of ownership by fellow American states.¹⁶² The ineffectiveness of such international law is evidenced by the previously discussed Mayan cultural property destruction in El Salvador, which proved detrimental to all other American states of Mayan cultural ancestry.¹⁶³

Some relief is provided in Article 17 of the Convention which charges the General Secretariat of the Organization of American States with ensuring the enforcement and effectiveness of this Convention, and with arranging technical cooperation requested by the States.¹⁶⁴ Theoretically, an argument for intervention by the General Secretariat can be found in this language, which is very broad and unlimiting on its face. If support for more effective rights of protective intervention are needed, the American States need only invoke this language, found in existing agreements, as foundational legal support, and develop their common ownership arguments accordingly.

C. UNESCO and Multilateral Cultural Property Treaties

In addition to regional agreements, the development of multilateral cultural property treaties was also prevalent in the 1970s. In fact, between 1956 and 1980, the UNESCO General Conference adopted ten Recommendations and two international Conventions covering practically all aspects of the identification, protection, preservation, restoration, and presentation of movable and immovable cultural heritage.¹⁶⁵ Unfortunately from a common culture perspective, some of these have evidenced more of a movement away from the common property precepts that sprouted from the Hague 1954 Cultural Property Convention and the European Conventions, and more toward what has been called the "repatriation movement" in response to significant "de-contextualization"

¹⁶¹ *Id.* art. 7.

¹⁶² *Id.* art. 5.

¹⁶³ See *supra* note 18 and accompanying text.

¹⁶⁴ Convention of San Salvador, *supra* note 20, art. 17(a).

¹⁶⁵ See Bolla, *supra* note 121, at 766-67 nn. 4-12 (providing a partial listing of these recommendations and treaties).

of artifacts from lessor developed countries.¹⁶⁶

While UNESCO advocates that the full enjoyment of common heritage is an indispensable condition for self-realization of all peoples,¹⁶⁷ the focus of many of their recommendations and agreements is on the state's rights, as opposed to those who might claim common property rights on a cultural basis. The 1970 Convention on the Illicit Movement of Art Treasures, although not specifically applicable to immoveable cultural property, does recognize that "the protection of cultural heritage can be effective only if organized both nationally and internationally among States working in close co-operation."¹⁶⁸ At the same time, however, it upholds the priority of each State's rights in controlling protection efforts over cultural property found within the national territory of each state.¹⁶⁹

Herein lies the major dilemma and obstacle to resolving the question of who should control this common property. Of concern is the

¹⁶⁶ "Repatriation" refers to the return of cultural objects to their nations of origin, to the nations whose people now include the cultural descendants of those who made the objects, or to the nations whose territory now includes the original site from which the objects were removed. Merryman, *Two Ways of Thinking*, *supra* note 48, at 845.

"De-contextualization" occurs, for example, when "[a] Mayan stela torn from an undeveloped, undocumented site in the jungle of Belize and smuggled to Switzerland to be sold becomes anonymous. Both it and the site have been deprived of valuable archaeological and ethnological information." *Id.* at 843.

Preventing the removal of artifacts and archeological items from their site of original discovery is a major concern among archaeologists and historians since:

[A]n Indian artifact or a historic object that has been stripped of its historic or scientific significance by having been taken out of its original context without an adequate record . . . is an object of interest or curiosity for itself only, not for what it might have told us about the culture from which it came.

Hester A. Davis, *The Crisis in American Archeology*, 175 *SCIENCE* 267, 272 (1972).

¹⁶⁷ See De Jager, *supra* note 36, at 190 (referring to comments made by UNESCO Committee of Experts to Study the Question of the Restitution of Works of Art, Mar. 29-Apr. 2, 1976, Final Report 4).

¹⁶⁸ UNESCO Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property, Nov. 14, 1970, 823 U.N.T.S. 231 (emphasis added).

¹⁶⁹ Article 4 of the Convention provides that:

The States Parties to this Convention recognize that for the purpose of the Convention property which belongs to the following categories forms part of the cultural heritage of each State: (a) Cultural property created by the individual or collective genius of nationals of the State concerned, and cultural property of importance to the State concerned created within the territory of that State by foreign nationals . . . (b) cultural property found within the national territory.

Id. art. 4.

Convention's definition of cultural property which provides that host states alone determine which property is important to the cultural heritage.¹⁷⁰ The Convention goes on to give an extensive, yet not exhaustive, list of categories of objects that are covered by the treaty.¹⁷¹ The generality in the category descriptions allows each state to subjectively specify the content and scope of which cultural objects are to be subject to the Convention's protective terms.¹⁷² As a result, there is great diversity among the various national legal systems in establishing their respective criteria for determining which objects, if any, are to be protected.¹⁷³

While this theory might recognize the unique contribution of each state to the cultural heritage of mankind,¹⁷⁴ granting each state the right to subjectively specify the scope and content of cultural property includes the right to exclude property from protection that others outside the state might find more culturally valuable. It also permits an exclusion from protection on grounds of domestic budget concerns — *i.e.* if not designated, no funds need be allocated to that artifact for protective efforts. A nationally controlled, self-designated cultural property framework cannot truly promote common outside cultural property interests. Since UNESCO 1970, "protection" of cultural property has in reality become a euphemism for "retention" or "protection against removal" with little regard for the Convention's other language promoting a common cultural property concept.¹⁷⁵ Once again, the foundational support for common protective efforts, including rights of intervention, are found in the treaty's noble ambitions laid down in its introduction. Yet the treaty's text defaults to traditional territorial concepts for its protective legal framework, a framework susceptible to the situs government's self-serving motivations, domestic political persuasion, and internal economic conditions.

An approach more supportive of common control of common property is found in the 1972 Recommendation Concerning the Protection, at a National Level, of the Cultural and Natural Heritage. This document emphasizes that "every country in whose territory there are components of the cultural and natural heritage has an obligation to safeguard *this*

¹⁷⁰ The Convention defines cultural property as "property which, on religious or secular grounds, is specifically designated by each State as being of importance for archaeology, prehistory, history, [literature, art, or science]" *Id.* art. 1 (emphasis added).

¹⁷¹ *Id.* art. 1(a)-(k).

¹⁷² Nieciówna, *supra* note 6, at 249.

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 250.

¹⁷⁵ Merryman, *Two Ways of Thinking*, *supra* note 48, at 844.

part of mankind's heritage and to ensure that it is handed down to future generations."¹⁷⁶ A significant weakness, however, in the Recommendation is that there is no express definition of what comprises the specifically identifiable "components" of mankind's heritage. The Recommendation does state, as a general principle, that

[t]he cultural and natural heritage represents wealth . . . which impose[s] responsibilities on the States in whose territory it is situated, both vis-à-vis their own nationals and vis-à-vis *the international community as a whole*, [and that] [t]he cultural or natural heritage should be considered in its entirety *as a homogeneous whole* comprising not only works of great intrinsic value, but also more modest items that have with the passage of time, acquired cultural or natural value.¹⁷⁷

While the Recommendation also emphasizes a territorial approach, the seeds of support for internationally initiated protective efforts can be found in this language. If it is recognized that host States have responsibilities to the international community for cultural heritage located within their borders, then the international community must have rights and remedies for the host State's breach of that duty and responsibility. Rights of entry to investigate, diagnose, and cure must be included in those recognized remedies or the UNESCO language remains an ineffective legal fiction.

The most extensive international legislation concerning preservation of mankind's common cultural heritage occurred in 1972 with the signing of the UNESCO World Heritage Convention.¹⁷⁸ Little discussion of this agreement is mentioned, however, in most articles analyzing cultural property problems. The treaty recognizes "parts of the cultural or natural heritage are of outstanding interest and therefore need to be preserved as part of the world heritage of mankind as a whole."¹⁷⁹ However, it too fails to provide special provisions for international intervention and protection of common cultural heritage, instead fully respecting the sovereignty of the States on whose territory the cultural and natural heritage is situated, without prejudicing property rights provided by national legislation.¹⁸⁰

¹⁷⁶ UNESCO Recommendation Concerning the Protection, at a National Level, of the Cultural and Natural Heritage, UNESCO Doc. 17 C/107 (Nov. 15, 1972), pmb., *reprinted in* 11 I.L.M. 1367 (1972) (emphasis added).

¹⁷⁷ *Id.* at 1368 (emphasis added).

¹⁷⁸ World Heritage Convention, *supra* note 19.

¹⁷⁹ *Id.* pmb.

¹⁸⁰ *Id.* art. 6. Article 6 indicates:

1. Whilst fully respecting the sovereignty of the States on whose territory

The treaty does provide for the creation and maintenance of a World Heritage List and a List of World Heritage in Danger.¹⁸¹ Yet the Convention relies on each State that is a party to submit to the World Heritage Committee an inventory of property forming part of what it subjectively considers to be cultural and natural heritage, situated in its territory, with an outstanding universal value to the formation of the cultural heritage and natural heritage.¹⁸² The Convention has an express stipulation that "inclusion of a property in the World Heritage List requires the consent of the State concerned."¹⁸³

The World Heritage Convention established The World Heritage Committee to consider requests from any State Party for international assistance for property of universal value located within its territory,¹⁸⁴ and indicates what forms of assistance will be granted.¹⁸⁵ While these

the cultural and natural heritage . . . is situated, and without prejudice to property rights provided by national legislation, the States Parties to this Convention recognize that such heritage constitutes a world heritage for whose protection it is the duty of the international community as a whole to co-operate.

2. The States Parties undertake . . . to give their help in the identification, protection, conservation and preservation of the cultural and natural heritage . . . *if the States on whose territory it is situated so request.*

Id. (emphasis added).

¹⁸¹ *Id.* art. 11.

¹⁸² *Id.*

¹⁸³ *Id.* arts. 11(1)-(4).

¹⁸⁴ *Id.* arts. 19, 21. Article 19 provides that "[a]ny State Party to this Convention may request international assistance for property forming part of the cultural or natural heritage of outstanding universal value *situated within its territory.*" *Id.* art. 19 (emphasis added). While, article 21(1) provides:

The World Heritage Committee shall define the procedure by which requests to it for international assistance shall be considered and shall specify the content of the request, which should define the operation contemplated, the work that is necessary, the expected cost thereof, the degree of urgency and the reasons why the resources of the State requesting assistance do not allow it to meet all the expenses.

Id. art. 21.

¹⁸⁵ *Id.* art. 22. Article 22 provides:

Assistance granted by the World Heritage Committee may take the following forms:

- (a) studies concerning the artistic, scientific and technical problems raised by the protection, conservation, presentation and rehabilitation of the cultural and natural heritage, as defined in paragraphs 2 and 4 of Article 11 of this Convention;
- (b) provision of experts, technicians and skilled labour to ensure that the approved work is correctly carried out;
- (c) training of staff and specialists at all levels in the field of identification, protection, conservation, presentation and rehabilitation of the

are applaudable programs, again they are restricted to impetus from the territorial state. Despite the treaty's regard for the world's heritage, the world receives no rights of protection; only States have such rights. The assistance provisions need to be expanded to include a right for any State, not just the one where the cultural heritage is situated, to invoke the help and funding of this UNESCO Committee. The assistance granted by the Committee under the convention cannot be truly protective of common property rights without such recognized intervention provisions.

Further, while funding for properties can be provided by the International Fund for the Promotion of Culture of UNESCO, established in 1977,¹⁸⁶ or the World Heritage Fund established under Article 15 by the signatories to the World Heritage Convention,¹⁸⁷ difficulties in financing projects can arise under the existing treaty framework. Any

cultural and natural heritage;

(d) supply of equipment which the State concerned does not possess or is not in a position to acquire;

(e) low-interest or interest-free loans which might be repayable on a long-term basis;

(f) the granting, in exceptional cases and for special reasons, of non-repayable subsidies.

Id.

¹⁸⁶ The Fund's main sources are contributions by UNESCO member states, private institutions, and investment income. Although the fund did contribute to 198 projects in 74 countries from 1977 to 1985, the funding situation remains difficult. For example, the United States is one of four members not a signatory to the United Nations Law of the Sea Convention. As a result, it withheld its pro rata share of the costs of the U.N. budget for funding the Law of the Sea Preparatory Commission, a U.N. body that contributes to the UNESCO fund for archaeological purposes. Anastasia Strati, *Deep Seabed Cultural Property and the Common Heritage of Mankind*, 40 INT'L & COMP. L. Q. 859, 882 n.59 (1991).

¹⁸⁷ Article 15 provides:

1. A Fund for the Protection of the World Cultural and Natural Heritage of Outstanding Universal Value, called "the World Heritage Fund," is hereby established

3. The resources of the Fund shall consist of:

(a) compulsory and voluntary contributions made by the States Parties to this Convention,

(b) contributions, gifts or bequests which may be made by: (i) other states; (ii) the UNESCO, other organizations of the United Nations system, particularly the United Nations Development Programme or other intergovernmental organizations; (iii) public or private bodies or individuals;

(c) any interest due on resources of the Fund;

(d) funds raised by collections and receipts from events organized for the benefit of the Fund; and

(e) all other resources authorized by the Fund's regulations, as drawn up by the World Heritage Committee

World Heritage Convention, *supra* note 19, art. 15.

funding sources remain limited and unpredictable since contributions of Member States can be, and are, withheld for political reasons.¹⁸⁸

Therefore, common culture under the World Heritage Convention remains dependent upon the willingness and ability of the host state to provide protection; placing the territorial control of the nation-state above any worldwide or regional interest in the cultural heritage of mankind. This has, and will continue to create situations where domestic concerns take priority over common cultural property preservation, sometimes to the detriment of the world community's interests. A right of intervention could correct this international legal void by allowing protective cultural intercession in the event improved preservation is warranted.

VII. RIGHTS OF INTERVENTION FOR COMMON CULTURAL HERITAGE AND THE LAW OF THE SEA

Probably the clearest example of exceptional treatment of common cultural heritage is found in the context of the United Nations Convention on the Law of the Sea (UNCLOS).¹⁸⁹ The Convention seeks to develop the principle that "[t]he seabed and ocean floor, and the subsoil thereof, beyond the limits of national jurisdiction . . . as well as the resources of the area, are the common heritage of mankind."¹⁹⁰ The Convention further provides that "exploration of that area and the exploitation of those resources must be carried out for the benefit of all mankind."¹⁹¹ The "common heritage of mankind" in the UNCLOS con-

¹⁸⁸ Article 16(1) of the World Heritage Convention provides that "the States Parties to this convention undertake to pay regularly, every two years, to the World Heritage Fund, contributions, the amount of which, in the form of a uniform percentage applicable to all States, shall be determined by the General Assembly of States Parties to the Convention" *Id.* art. 16(1).

Unfortunately, more resourceful nations can opt out of the critical funding provisions of the World Heritage Convention, as in the case of the United States which ratified the treaty "subject to a declaration under Article 16(2) that the United States shall not be bound by the provisions of Article 16(1)." *Id.*

Article 16(2) is a major weakness to the Convention's ability to properly fund protective efforts since it provides that "each State . . . may declare, at the time of the deposit of its instruments of ratification, acceptance or accession, that it shall not be bound by the provisions of paragraph 1 of this Article." *Id.* art. 16(2). This is precisely what the United States has done.

¹⁸⁹ U.N. Doc. A/CONF.62/122 (1982) as amended in U.N. Doc. A/CONF.62/122/Corr. 3 (1982) and A/CONF.62/122 Corr. 8 (1982), reprinted in 21 I.L.M. 1261 (1982) [hereinafter UNCLOS].

¹⁹⁰ *Declaration of Principles Governing the Sea-Bed and the Ocean Floor, and the Subsoil Thereof, Beyond the Limits of National Jurisdiction*, G.A. Res. 4355, 25 U.N. GAOR Supp. (No. 28), at 24, U.N. Doc. A/8028 (1970).

¹⁹¹ UNCLOS, *supra* note 189, pmbl.

text is assumed, by some scholars, to consist of the essential characteristic that objects covered by this principle cannot be appropriated by a person or a state, and that all states participate in the stewardship of these resources.¹⁹² The Convention grants exclusive use of territorial waters to coastal states for the twelve-mile territorial zone,¹⁹³ and preferential use of the twenty-four-mile contiguous zones.¹⁹⁴ Arguably, it does not exclude others from the twenty-four-mile zone and beyond for purposes of scientific research, provided the intruders do not remove objects, or infringe on the coastal states "customs, fiscal, immigration, or sanitary laws and regulations within its territory or territorial sea."¹⁹⁵

While the term "common heritage" originally concerned the mineral resources of the deep seabed, some authors have stated that the concept was worth using equally with regard to art and archaeology.¹⁹⁶ Further, since all of the previously discussed cultural property conventions and instruments apply a territorial-jurisdictional approach with respect to law-making and enforcement over archaeological resources, drafters of UNCLOS concluded that the existing cultural instruments could not

¹⁹² De Jager, *supra* note 36, at 189.

¹⁹³ "Every State has the right to establish the breadth of its territorial sea up to a limit not exceeding 12 nautical miles measured from baselines determined in accordance with this Convention." UNCLOS, *supra* note 189, art. 3.

¹⁹⁴ "The sovereignty of a coastal State extends, beyond its land territory and internal waters . . . to an adjacent belt of sea, described as the territorial sea." *Id.* art. 2(1).

In the zone contiguous to a state's territorial sea, or its contiguous zone, the coastal State may exercise the control necessary to "1. (a) prevent infringement of its customs, fiscal, immigration or sanitary laws and regulations . . . [and]

(b) punish infringement of the above laws and regulations

2. The contiguous zone may not extend beyond 24 nautical miles from the baselines from which the breadth of the territorial sea is measured." *Id.* art. 33.

¹⁹⁵ *Id.* art. 33. In addition, article 303 entitled "Archaeological and Historical Objects Found at Sea" provides:

1. States have the duty to protect objects of an archaeological and historical nature found at sea and shall co-operate for this purpose.

2. In order to control traffic in such objects, the coastal State may, in applying article 33, presume that their removal from the sea-bed in the zone referred to in that article without its approval would result in an infringement within its territory or territorial sea of the laws and regulations referred to in that article.

3. Nothing in this article affects the rights of identifiable owners, the law of salvage or other rules of admiralty, or laws and practices with respect to cultural exchanges.

4. This article is without prejudice to other international agreements and rules of international law regarding the protection of objects of an archaeological and historical nature.

Id. art. 303.

¹⁹⁶ De Jager, *supra* note 36, at 189.

provide a satisfactory basis for protecting deep seabed cultural property.¹⁹⁷ Therefore, the 1982 UNCLOS specifically provided for archaeological and historical objects under the sea¹⁹⁸ in its desire to fully protect the common heritage of mankind.

International practice generally has granted archaeological sites under the water universal or common ownership properties not granted sites found on land. In the early 1970's, both Greece and Turkey submitted proposals to the United Nations seabed working sub-committee that provided for the protection of the archaeological and historical treasures of the deep seabed as the common heritage of mankind.¹⁹⁹ The proposals further recognized the Seabed Authority as the competent international organ to administer and protect deep seabed archaeological treasures.²⁰⁰ The goal was to empower the Seabed Authority established under UNCLOS as the custodian of archaeological treasures for the benefit of all mankind.²⁰¹ This approach would preserve rightful interests of States of origin of a sunken vessel and/or treasures on board. As custodian, it would protect shared interests of all States since there are considerable difficulties in identifying the true State of origin when the same culture might have been shared in the past by what is now several countries.²⁰² While the Seabed Authority unfortunately was never established as such a custodian, Article 149 of UNCLOS did establish that all archaeological objects found beyond the twelve-mile territorial zones were part of the heritage of all mankind.²⁰³ Therefore, since 1982, UNCLOS has served as the governing body of law regarding underwater archaeological remains, treating those found beyond the twelve-mile zone as common property of mankind deserving of international access for identification and research purposes.

Some legal authorities have recommended a multiple jurisdiction

¹⁹⁷ Strati, *supra* note 186, at 867-68.

¹⁹⁸ *Id.* at 865 (referencing UNCLOS article 303).

¹⁹⁹ *Id.* at 874-75.

²⁰⁰ *Id.*

²⁰¹ *Id.*

²⁰² *Id.* at 875-76.

²⁰³ Article 149 provides:

[A]ll objects of an archaeological and historical nature found in the Area [beyond the twelve-mile national jurisdiction of coastal states] shall be preserved or disposed of *for the benefit of mankind as a whole*, particular regard being paid to the preferential rights of the States or Country of origin, or the State of cultural origin, or the State of historical and archaeological origin.

UNCLOS, *supra* note 189, art. 149 (emphasis added). For a discussion of these terms, see Strati, *supra* note 186.

approach to underwater resources, including archeological finds.²⁰⁴ This involves replacing the principle of "freedom of the seas" with a principle of "common heritage of mankind" in order to preserve the greater part of the ocean, including any archaeological sites, as a commons accessible to the international community.²⁰⁵ Under this scenario, the commons of the high seas would not be open to the whims of the users and exploiters, but would be internationally administered for the common good.²⁰⁶ This would hold true for any archaeological sites located in the twenty-four-mile contiguous zones. Although the coastal state retains primary control over its contiguous zone, an important corollary is that it is not *exclusive* control. As expressed in the *Fisheries Jurisdiction Cases*,²⁰⁷ the notion that one state may have a preferential right to the sea in its contiguous territorial zone implies the existence of other legal rights in respect of which that preference can operate — *i.e.* one cannot have preferred rights unless others also have some rights to the same property.²⁰⁸

In this regard, characterizing one state's rights as preferential implies a priority of rights, but cannot imply the extinction of the concurrent rights of other states.²⁰⁹ Other states may still gain access to that property under international law. Therefore, multiple states can have jurisdiction and recognized rights over the same property located within a specific maritime territory.

A similar concept could be applied above ground as well, subordinating territorial rights of states to an overriding international law of protection and intervention for scientific purposes, effectively administered by an international authority.²¹⁰ As with the law of the sea where "limits to national jurisdictions are essential,"²¹¹ effective preservation

²⁰⁴ L.F.E. Goldie, *A Note on Some Diverse Meanings of "The Common Heritage of Mankind,"* 10 SYRACUSE J. INT'L L. & COM. 69, 87 (1983) (referencing Ambassador Arvid Pardo's remarks on the law of the sea negotiations). Ambassador Pardo is "regarded as the progenitor of this phrase [common cultural heritage] in the law of the sea context," advocating "a completely new blueprint for the law governing mankind's use of the resources of the high seas beyond the limits of the resource jurisdiction of any state." *Id.*

²⁰⁵ *Id.* at 86.

²⁰⁶ *Id.*

²⁰⁷ *Fisheries Jurisdiction (U.K. v. Iceland)*, Merits Judgment, 1974 I.C.J. 3; *Fisheries Jurisdiction (Federal Republic of Germany v. Iceland)*, cited in Strati, *supra* note 186, at 883 n.64.

²⁰⁸ Strati, *supra* note 186, at 883.

²⁰⁹ *Id.*

²¹⁰ Likewise, this could also involve the establishment of an international trust with properties deemed to be of significance to groups or the world placed under the protection and control of an international, yet nongovernmental, body acting as custodian and trustee, with rights of intervention into territorial sovereignty of host states in order to implement those rights of protection.

²¹¹ Charles F. Doran, *Multiple Jurisdiction — Will It Save or Destroy the Oceans?*, 7 VAND.

of the non-aquatic common heritage requires similar limitations. Limitations placed on freedom of the high seas to protect archeological remains have been considered only slight intrusions on the sovereignty of the high seas since the benefits of protecting the world heritage more than offset the intrusion.²¹²

Further, since inadequate protection by a host state of common cultural property has effects on the rights of outsiders who share an interest in that property, extraterritorial jurisdiction can and should be justified to intervene in the host state's domestic policies and practices.²¹³ The "effects rule" of long arm jurisdiction has been given as a basis for a state's extraterritorial jurisdiction over marine archeological sites.²¹⁴ Such an effects argument could be used in the context of land-based common cultural property — *i.e.* the failure to preserve common culture has an effect on property rights of outside states, who can then claim jurisdiction over preservation efforts. The ideal scenario, however, would be for that jurisdiction to be exercised on behalf of interested national governments or groups by an impartial international administrator.

VIII. CONCLUSION

Since the world has long recognized that cultural property comprising mankind's common cultural heritage should not be the province of

J. TRANSNAT'L L. 631, 659 (1974). Wolfgang Friedman has proposed that "international law recognize a new jurisdictional zone, distinct from the territorial waters zone and of much greater expanse, within which a coastal state would have control solely over pollution and conservation matters." *Id.* at 660. A similar multijurisdictional approach can be suggested for territorial land zones of cultural significance with the host state responsible for some ministerial duties, but with ultimate control and rights vested in an international organization, or in every state with recourse to such an international body in the event of local dereliction of duties.

²¹² John P. Fry, *The Treasure Below: Jurisdiction Over Salvage Operations in International Waters*, 88 COLUM. L. REV. 863, 881 (1988).

²¹³ *Id.* at 873.

²¹⁴ Fry discusses a U. S. state district court's issuance of a temporary restraining order preventing anyone having notice of the injunction from interfering with one salvage company's efforts to save the *Titanic*, a vessel lying in international waters, relying on the international maritime rule protecting "the right of first salvor." "The court reasoned that the presence of certain pieces of the vessel brought into the jurisdiction was sufficient to give constructive possession of the wreck, so that for the purpose of in rem jurisdiction the res was within the territory of the court." *Id.* at 873-74

Fry reasons that assertion of extraterritorial jurisdiction in this case falls under the "effects" rule often employed to reach foreign companies in their home countries where their acts violate the laws of the United States — such as antitrust laws. The effects of the foreign company's act interferes with the trade policies of the United States. "Similarly, in a treasure salvage case, the acts of the intervenor have the effect of interfering with the policies of the United States . . . [in] protecting the right of first salvor." *Id.* at 874-75.

any one state,²¹⁵ rights of protective intervention should not be so difficult to justify. In view of the importance of the world's archaeological and culturally significant sites, and the ineffective enforcement provisions of the existing body of international law surrounding cultural property, recognition of a new norm should emerge in limited and controlled settings: the right of foreign states, or an international body representing foreign state interests, to intervene in the domestic preservation policies and practices of host states, and in their territorial sovereignty if necessary, where that state is not protecting immoveable cultural property from *inter alia* war, elements, developers, and/or looters. Despite the previously mentioned difficulties associated with justifying such a position, it has been recognized that the initially dominant notion of national patrimony is slowly giving way to an implicit acknowledgement of the legitimacy of the doctrine of the common heritage of mankind.²¹⁶ And, if one accepts the doctrine of the common heritage of mankind, then the human community has the right to equal access,²¹⁷ even if that right requires intervention in territorial sovereignty for legitimate protective reasons.

However, justification of intervention for cultural protection must be certain to avoid any overt or hidden attempts by archaeologists, governments, or historians at "exploitative scholarship"²¹⁸ designed to plunder for profit or collection-building if the common cultural heritage is to successfully take on inherent rights of access. Further, as with intervention for humanitarian purposes,²¹⁹ any intervention to protect mankind's

²¹⁵ Mark F. Lindsay, *The Recovery of Cultural Artifacts: The Legacy of Our Archaeological Heritage*, 22 CASE W. RES. J. INT'L L. 165, 173 (1990).

²¹⁶ See generally Thomason, *supra* note 65, at 48 (citing various General Assembly resolutions since 1973 which show three basic trends in cultural property views, and indicating that "[f]inally, and most importantly, the notion of national cultural patrimony which was prevalent throughout the developing world in 1973 comes to co-exist with the concept of common heritage of mankind[]").

²¹⁷ *Id.* at 65.

²¹⁸ "If a specialist is willing to live off the ancient or modern culture of another country and then to cooperate in the illegal traffic of that country's art, his can only be termed exploitative scholarship." Coggins, *supra* note 2, at 265. My reference to this term indicates its applicability to any other covert motivation by those who gain access to another country's archeological sites under the guise of protective intervention, only to convert that entry into their own manipulative purposes.

²¹⁹ See generally Crabb, *supra* note 37, at 268, indicating that:

[H]umanitarian international law in order to function must observe the strictest neutrality as between antagonistic parties Organizations and persons seeking to perform humanitarian actions in a state can do so only with the consent of that state and hence cannot be perceived by it as antagonistic or partial in favour of its opponents, international or domestic.

cultural heritage must observe strict neutrality between antagonistic political parties if entry is to be accepted by the host state and the international community as legitimate and ultimately beneficial. Therefore, uncompromising neutrality must be the cornerstone of any protective programs sanctioning intervention.

Arguments of national patrimony and territorial sovereignty take on emotional appeal when further viewed in the context of economic reality. It is significant that many "relic-rich" countries — e.g. South American, African, and Asian states — have populations which at the present time have very severe problems of economic underdevelopment, accompanied by malnutrition and disease which continually lower the quality of life.²²⁰ It cannot be forgotten throughout this more idealistic argument that a State sometimes does not possess the necessary cash, personnel, equipment, or technology to supervise everything occurring within its territory or territorial sea, including activities of clandestine excavation or destruction of archeological sites.²²¹ This economic reality is particularly true after liberation from a colonial or oppressive regime.²²² But this call for increased protection of architectural monuments and archeological sites is not an argument in favor of "bricks over butter," or "logs over lives." The purpose of permitting protective intervention on behalf of cultural objects is not to downplay the reality of human necessities that might co-exist with the need for improved cultural protection. It is instead an argument for sanctioned assistance to help those who cannot, or have chosen not to, protect the world's heritage over which they are the present-day territorial guardians.

Economic arguments further arise in situations where the national patrimony of cultural items is viewed as an economic resource by the native population, appreciated more for its financial value in the illicit trade of archeological objects than for its cultural significance to that nation.²²³ In this regard, some view the effects of insufficient resources, neglect, mismanagement, corruption, and internal violence that destroys monuments, as well as people, as much the greater threat to the

²²⁰ PROTTE & O'KEEFE, *supra* note 13, at 125.

²²¹ Thomason, *supra* note 65, at 52.

²²² *Id.*

²²³ See PROTTE & O'KEEFE, *supra* note 13, at 125 (discussing Costa Rica, where the locals "speak of antiquities as 'the national patrimony,' not meaning by that an invaluable and inviolable heritage, but rather a rich resource to be exploited, as minerals are mined[]"). See also Peter A. Young, *Means of Survival*, *ARCHAEOLOGY*, Nov.-Dec. 1992, at 2 (relaying associate editor Angela Schuster's experience in a Peruvian market in Chiclayo when a local *bruja*, or witchdoctor, oblivious to the import ban on such objects, eagerly attempted to sell an artifact to her, "its sale [being] simply another means of survival[]").

cultural heritage of mankind.²²⁴ Existing international funding for the preservation of cultural property, such as the World Heritage Fund,²²⁵ cannot possibly solve all economic ills associated with such preservation when the lack of protection by a host state is only a symptom of the greater social and economic imbalances. The counterarguments to national patrimony and territorial sovereignty become increasingly difficult to justify when viewed in this context, contributing to the legal fictions associated with the protection of the common heritage of mankind.

International law already recognizes the special needs of cultural property, however, granting exceptions for its protection under the law when necessary — particularly in the context of the law of war. Territorial intervention within a properly controlled framework, under very limited circumstances, is merely a continuum of the existing protective regime where cultural property is concerned. This emerging norm has been described by scholars:

In a world organized into nation-states and in a system of international law in which the state is the principal player, an emphasis on nationalism is understandable. But the world changes, and with it the centrality of the state. A concern for humanity's cultural heritage is consistent with the emergence of international laws and institutions protecting human rights. A slighter emphasis on cultural nationalism is consistent with the relative decline of national sovereignty that characterizes modern international law.²²⁶

It is recognized that, in developing a rule permitting intervention in the territorial sovereignty of a state, the most serious tensions in international law are those affecting the relative power of States, particularly where the stakes involve a new distribution of elements such as territory.²²⁷ International law has, in fact, grown up by bits and pieces, and is still growing.²²⁸ The common interest of mankind in preserving its cultural heritage through intervention is present because of worldwide, not nationalistic considerations.²²⁹ While state practice is still inconsistent on this topic, there is a need to acknowledge an emerging norm of intervention, in what would be effective protective action beyond that expressly stated in the existing cultural treaties.

The 1972 World Heritage Convention recognizes in its preamble

²²⁴ Merryman, *International Art Law*, *supra* note 5, at 763.

²²⁵ World Heritage Convention, *supra* note 19, arts. 15-18.

²²⁶ Merryman, *Two Ways of Thinking*, *supra* note 48, at 852.

²²⁷ Goldie, *supra* note 204, at 106.

²²⁸ MERRYMAN & ELSÉN, *supra* note 1, at 13-14.

²²⁹ De Jager, *supra* note 36, at 192.

that national protection of the cultural heritage "often remains incomplete because of . . . the insufficient economic, scientific and technical resources of the country where the property [is located]" and that it is "incumbent on the international community . . . to grant collective assistance."²³⁰ This collective assistance might receive better support among the states if protective enforcement mechanisms operated more effectively. Expanding the international law of cultural property to include an internationally approved regime of intervention could raise the level of state interest in not only its own protective practices — *i.e.* to prevent external interference in their sovereign territory — but throughout the international community, who would now have a useful and substantive tool for cultural protection. The United Nations General Assembly long ago recognized that "mutual knowledge and understanding of the culture and life of nations [can] contribute to the strengthening of international confidence and to the maintaining of peace," and that "peoples of the world desire wide and intensified international cultural and scientific co-operation."²³¹ Without a right of intervention, these goals remain legal fiction to which states can continue to pay lip service, failing to allocate sufficient effort and resources to the universally recognized goal of protection of the world's common cultural heritage.

The fact that a concept is not universally accepted or continuously followed by all States is not a reason to stop advocating. The existence of war is not justification to discard the Hague and Geneva Conventions on the law of war, or the Red Cross and its protective regime, for that matter. Likewise, the lack of effectiveness of the World Heritage Convention does not serve as pretense for removing protection of common cultural property from the world community's priority list. We must continue to aspire toward the ideal, the "model code" of cultural protection laws on an international basis. This guiding line should rise to its most effective level — one with an enforcement regime that preempts the traditional concepts of territorial sovereignty and property law. In effect, the result must be one that includes a right of protective intervention for the sake of mankind's common cultural heritage.

²³⁰ World Heritage Convention, *supra* note 19, pmbl.

²³¹ G.A. Res. 1043(xi), U.N. GAOR, 11th Sess., U.N. Doc. A/3544 (1957) (This resolution was adopted 62 votes in favor, none against, and one abstention.).

